

## Memorandum 2017-19

**Relationship Between Mediation Confidentiality and Attorney Malpractice  
and Other Misconduct (Draft Tentative Recommendation)**

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Attached for the Commission's review is a staff draft of a tentative recommendation that would implement the Commission's tentative decisions in this study.<sup>1</sup> The draft consists of three parts:

- Part I. Research Findings
- Part II. Preliminary Conclusions
- Part III. Proposed Legislation

The draft is not quite complete; the staff still needs to prepare a few sections at the end of Part I.<sup>2</sup> We plan to do that for the June meeting.

The remainder of this memorandum discusses some issues relating to the attached draft. The following new communications pertain to issues requiring resolution:

	<i>Exhibit p.</i>
• Ron Kelly, Berkeley (3/21/17) .....	1
• Lorraine M. Walsh, State Bar Committee on Mandatory Fee Arbitration (3/13/17) .....	2

## FORMAT

As discussed in Memorandum 2017-8, the staff originally planned to split the Commission's proposal into two separate documents:

- A tentative report, which would summarize the Commission's research for this study, including its work on the matters requested by the Legislature.

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. The missing sections are the discussions of (1) federal law, (2) empirical evidence, (3) scholarly views, and (4) possible approaches.

- A tentative recommendation, which would present and explain the Commission's preliminary conclusions.

We thought that approach might be helpful to individuals and organizations that would like to review the Commission's proposal and provide input, but do not have the time or inclination to read all of the background material. It would permit them to focus on the tentative recommendation and refer to the tentative report only if they desire background information on a particular point.

We started to prepare drafts along those lines, but the approach did not seem to be working as well as we originally thought. We therefore switched gears and prepared a single document broken into three distinct parts, as attached.

### **Is that format acceptable to the Commission?**

#### TYPES OF DISPUTES IN WHICH THE NEW EXCEPTION WOULD APPLY

The Commission needs to resolve two issues relating to the types of disputes in which the new exception would apply. The first issue is left over from the February meeting; the second issue is new.

### **Implementation of Decision at December Meeting**

At the December meeting, the Commission discussed several issues relating to the types of disputes in which its proposed new exception (proposed Evidence Code Section 1120.5) would apply. The Commission decided that the proposed statutory language in Discussion Draft #1 was satisfactory to address those issues.<sup>3</sup>

It further decided, however, that the corresponding Comment should state:

Section 1120.5 applies "when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has by virtue of being an attorney — in the course of providing professional services." *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015) (emphasis in original); *see also id.* at 1239. "Misconduct does not 'aris[e] in' the performance of professional services ... merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the misconduct." *Id.* at 1238.<sup>4</sup>

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3. See Minutes (Dec. 2016), pp. 5-6.

4. *Id.* at 6.

The Commission did not specify where in the Comment to place that language.

To implement the Commission's decision, the staff revised the second paragraph of the Comment as shown in underscore below:

Under paragraph (1) of subdivision (a), this exception pertains to an attorney's conduct in a professional capacity. More precisely, the exception applies "when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has by virtue of being an attorney — in the course of providing professional services." *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015) (emphasis in original); *see also id.* at 1239. "Misconduct does not 'aris[e]' in the performance of professional services ... merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the misconduct." *Id.* at 1238. The exception applies only with respect to alleged misconduct of an attorney acting as an advocate, not with respect to alleged misconduct of an attorney-mediator.

**Is this revision satisfactory?**

#### **Issue Raised by the State Bar Committee on Mandatory Fee Arbitration**

The State Bar Committee on Mandatory Fee Arbitration (hereafter, "Fee Arbitration Committee" or "the committee") has a concern about the type of cases in which the Commission's proposed new exception would apply. We describe the concern first and then provide some analysis.

##### *Concern Raised by the Committee*

The Fee Arbitration Committee notes that the Commission's proposed legislation appears to apply only in a legal malpractice case or in a State Bar disciplinary proceeding.<sup>5</sup> The committee says that if the Commission decides to recommend creation of a new exception to mediation confidentiality, then that exception "should apply to disputes between an attorney and client concerning fees, costs, or both, including proceedings under the State Bar Act, Chapter 4, Article 13-Arbitration of Attorneys' Fees as set forth in Business and Professions Code Sections 6200-6206."<sup>6</sup> More specifically, the committee suggests revising the proposed new exception as shown in underscore below:

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5. Exhibit p. 2.

6. *Id.*

**Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when representing client in mediation context**

SEC. \_\_\_\_\_. Section 1120.5 is added to the Evidence Code, to read:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if both of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:

(A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

(C) A dispute between a lawyer and client concerning fees, costs, or both including a proceeding under the State Bar Act, Chapter 4, Article 13-Arbitration of Attorneys' Fees, Business & Professions Code Sections 6200-6206.

(b) ....<sup>7</sup>

The committee explains that disputes between an attorney and client concerning fees, costs, or both ("attorney-client fee disputes") "can involve claims of legal malpractice or professional misconduct that take place in the context of a mediation or a mediation consultation."<sup>8</sup> The committee warns that "[i]f attorney-client fee disputes are not included in the proposed legislation, an anomalous situation would be created whereby evidence would be admissible in a legal malpractice case or a State Bar disciplinary proceeding, but the *identical* evidence would not be admissible in the context of an attorney-client fee dispute, notwithstanding Business & Professions Code Section 6203(a)."<sup>9</sup>

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7. Exhibit p. 4.

8. Exhibit p. 3. The committee gives the following examples: "[T]here can be claims the attorney made a legally significant error when the attorney induced the client to settle for a lower amount, the attorney agreed to modify the written fee agreement and lower the fee and then reneged, the attorney agreed to resolve liens in the case and then failed to settle with the lienholder, the attorney agreed to absorb all the costs incurred and then required the client to pay all costs out of his or her share of the settlement, or the attorney failed to explain the tax ramifications of the proposed settlement." *Id.*

9. *Id.* (emphasis in original). Business and Professions Code Section 6203(a) provides in part:

Evidence relating to claims of malpractice and professional misconduct, shall be admissible only to the extent that those claims bear upon the fees, costs, or

### *Staff Analysis*

As currently drafted, the Commission's proposal focuses specifically on the topic of most concern to the Legislature in assigning this study: the relationship between mediation confidentiality and alleged attorney misconduct in a professional capacity in a mediation context.<sup>10</sup> For instance, the attached draft would explain:

The proposed new exception would only apply in the following types of claims:

- (1) A disciplinary proceeding under the State Bar Act or a rule or regulation promulgated pursuant to that Act. Such a proceeding serves the critical function of protecting the public from attorney malfeasance.
- (2) A cause of action seeking damages from a lawyer based on alleged malpractice. This type of claim further promotes attorney accountability, while also providing a means of compensating a client for breach of an attorney's professional duties.

The proposed new exception would not apply in any other type of claim, because that does not appear necessary to accomplish the Commission's objectives.<sup>11</sup>

In taking that approach, the Commission already determined that the proposed new exception would not apply in every situation that "can involve claims of legal malpractice or professional misconduct that take place in the context of a mediation or a mediation consultation." In particular, the Commission specifically decided that the new exception could not be used in a case that seeks to undo a mediated settlement agreement.<sup>12</sup> As the attached draft would explain,

#### ***No Undoing Settlements***

The proposed new exception would not apply in resolving a claims relating to the enforcement of a mediated settlement agreement, such as a claim for rescission of such an agreement or a

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both, to which the attorney is entitled. The arbitrators shall not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying the claim. Nothing in this section shall be construed to prevent the arbitrators from awarding the client a refund of unearned fees, costs, or both previously paid to the attorney.

10. For background on this point, see the discussion of "Scope of Study" at pp. \_\_-\_\_ of the attached draft.

11. Attachment p. \_\_ (footnotes omitted). See also proposed Evid. Code § 1120.5 & Comment (Attachment pp. \_\_-\_\_); Minutes (Oct. 2015), p. 5.

12. Minutes (Oct. 2015), p. 5.

suit for specific performance. This limitation is designed to preserve the finality of a mediated settlement agreement and protect against claims based on buyer's remorse. Once parties resolve a dispute through mediation and properly memorialize their agreement, they should be able to rely on that agreement and put the dispute behind them.<sup>13</sup>

Under the Commission's current draft, an attorney-client fee arbitration would be another situation in which a party might contend that an attorney engaged in mediation misconduct, but the proposed new exception would not apply. The question is whether that situation warrants different treatment than a proceeding relating to enforcement of a mediated settlement agreement. Put differently, is there a need to permit a party to invoke the proposed exception in an attorney-client fee arbitration if the party could do so in a State Bar disciplinary proceeding *and* in a legal malpractice case?

In answering that question, it seems important to consider that "a client's right to request or maintain arbitration under the Mandatory Fee Arbitration Act *is waived* if the client commences an action seeking '[a]ffirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct.'"<sup>14</sup> In other words, a client cannot pursue both a legal malpractice claim and an attorney-client fee arbitration.

**Does the Commission wish to revise its proposed exception as requested by the Fee Arbitration Committee?** A representative of the committee is planning to attend the upcoming meeting to explain its position on this matter.

**If the Commission decides to stick with its current approach, then some revisions of the attached draft may nonetheless be in order.** In particular, in preparing the proposed legislation, the staff wrongly assumed that a disciplinary proceeding is the only kind of proceeding that involves a complaint against an attorney "under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act." As we now understand it, an attorney-client fee arbitration could also fall into that category; perhaps there are other such situations as well.

It may therefore be advisable to make more explicit that the proposed new exception would apply only in a State Bar disciplinary proceeding, as opposed to any other type of matter arising under the State Bar Act or a rule or regulation

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13. Attachment p. \_\_ (footnotes omitted).

14. Exhibit p. 3, *quoting* Bus. & Prof. Code § 6201(d)(2) (emphasis added by CLRC staff).

promulgated pursuant to that Act. For example, **the following revision might be helpful:**

**Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when representing client in mediation context**

SEC. \_\_\_\_\_. Section 1120.5 is added to the Evidence Code, to read:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if both of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:

(A) A ~~complaint~~ disciplinary proceeding against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) ....

**Similar revisions might be appropriate elsewhere in the attached draft.** If needed, the staff will deal with that point after the Commission makes the policy decision raised by the Fee Arbitration Committee.

NOTICE PROVISION

At the December meeting, the Commission also discussed whether to add a notice provision to its proposed new exception, along the following lines:

Upon filing a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff or cross-complainant shall serve the complaint or cross-complaint by mail, in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, on all of the mediation participants whose addresses are reasonably ascertainable.<sup>15</sup>

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15. See Memorandum 2016-58, p. 36.

The Commission decided to add such a provision, but it asked the staff to revise the language to address the possibility that a disputant might not know or be able to determine the identity of all of the mediation participants.<sup>16</sup>

To implement that decision, the staff added a new subdivision to proposed Section 1120.5. The new subdivision provides as follows, with deviations from the previously discussed language shown in ~~strikeout~~ and underscore:

(d) Upon filing a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff or cross-complainant shall serve the complaint or cross-complaint by mail, in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, on all of the mediation participants whose identities and addresses are reasonably ascertainable. This requirement is in addition to, not in lieu of, other requirements relating to service of the complaint or cross-complaint.

The staff also added the following new paragraph to the accompanying Comment:

Under subdivision (d), when a party files a legal malpractice case in which mediation communications or writings might be disclosed pursuant to this section, that party must promptly provide notice to the mediation participants regarding commencement of the case. Each mediation participant is entitled to such notice, so long as the participant's identity and address is reasonably ascertainable. This affords an opportunity for a mediation participant who would not otherwise be involved in the malpractice case to take steps to prevent improper disclosure of mediation communications or writings of particular consequence to that participant. For instance, a mediation participant could move to intervene and could then seek a protective order or oppose an overbroad discovery request.

### **Are these revisions acceptable to the Commission?**

#### ISSUES RAISED BY THE PUBLIC EMPLOYMENT RELATIONS BOARD

Earlier this year, the Public Employment Relations Board ("PERB") requested an exemption from the Commission's proposed new exception.<sup>17</sup> More specifically, it wrote that "[t]he most unambiguous clarification would include language that specifically exempts State of California employees performing

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16. Minutes (Dec. 2016), p. 7.

17. See Memorandum 2017-8, Exhibit pp. 1-5.



formal mediation work as mediators or attorneys from the compelled disclosure of information disclosed during mediation, or at the very least provide this protection to PERB ....”<sup>18</sup>

From discussions with PERB representatives before and during the February Commission meeting, it is clear that PERB’s greatest concern is the possibility that the Commission’s proposal would require PERB to provide evidence regarding a PERB mediation, such as by forcing a PERB mediator to testify or produce documentary evidence.<sup>19</sup> PERB says that such disclosures would severely damage its reputation for neutrality and impair its ability to effectively resolve the state’s labor disputes.<sup>20</sup>

At the February meeting, the Commission began discussing the possibility of revising its proposal to make more clear how it would apply to a mediator, particularly a PERB mediator. Initially, the Commission considered the possibility of emphasizing that its proposal would not in any way change Evidence Code Section 703.5, the provision that makes a mediator incompetent to testify “in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure.”

PERB is concerned, however, that Section 703.5 does not expressly address whether a mediator (or an entity that employs mediators, like PERB) is competent to provide documentary evidence regarding a mediation. To the best of the staff’s knowledge, there is no case law that squarely determines how Section 703.5 would apply to that situation.

Because Section 703.5 does not expressly address one of PERB’s main concerns, emphasizing that the Commission’s proposal would not affect that provision might not be the best approach to resolve those concerns. Rather, it may be better to deal with PERB’s concerns directly in the Commission’s proposed new exception, by adding language that expressly states whether and, if so, how, that exception would apply to oral and/or written evidence from a

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18. Memorandum 2017-8, Exhibit p. 1.

19. See, e.g., Memorandum 2017-8, p. 6.

20. Memorandum 2017-8, Exhibit p. 5.

mediator. The Commission did not vote on that point at the February meeting, but the members present seemed to generally agree on it.

To implement that approach, however, the Commission would have to decide more specifically than in the past how its proposed new exception would apply to oral and/or written evidence from a mediator. The Commission began discussing that issue in February, but did not reach a resolution before adjourning the meeting.

**Key points to resolve are:**

- Should a request for written evidence from a mediator be treated the same way as a request for oral testimony from a mediator?
- Should the exceptions stated in Section 703.5 apply to a request for written evidence from a mediator? To a request for oral testimony from a mediator?

Once the Commission resolves those points, the staff will draft language to implement its decision.

ISSUES RAISED BY RON KELLY

In a new letter, mediator Ron Kelly states that the Commissioners and stakeholders in this study “can probably agree” that “[p]articipants entering mediation at least deserve to know when they will be, and will not be, creating new admissible evidence.”<sup>21</sup> He thus “respectfully request[s] that a Commissioner ask for a clear vote on” this question:

Does the Commission seek to permit a dissatisfied client, and her/his accused attorney to:

a) subpoena all opposing parties to produce all confidential mediation briefs, offers, admissions, potential resolutions and other electronic communications with their mediator, and to

b) subpoena all opposing parties to repeat their mediation communications under oath in depositions, if the client or attorney can reasonably represent they are seeking to discover evidence relevant to their later malpractice claims or defenses?<sup>22</sup>

If the Commission’s answer to the above question is “yes,” Mr. Kelly further urges a member of the Commission to “move that the proposed new statute include a mandatory Miranda-like warning in clear simple language.”<sup>23</sup> In

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21. Exhibit p. 1.

22. *Id.* (boldface omitted).

23. *Id.*

particular, he suggests that a warning like the following be mandatory at the outset of any mediation involving an attorney:

**Warning!**

**Anything you say in mediation you may be subpoenaed to repeat under oath if any of the other parties later complains against their lawyer.**

**You may also have to give them any documents we create in mediation, and any texts or emails we send.<sup>24</sup>**

This is a new suggestion. Does the Commission have any interest in the type of approach Mr. Kelly suggests?

Respectfully submitted,

Barbara Gaal  
Chief Deputy Counsel

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24. *Id.*

March 21, 2017

**Re: Study K-402 - Via Email - Request for Votes on Intent and New Language**

Dear Chairperson Lee, Commissioners, and Staff,

The Commissioners and stakeholders involved in this discussion can probably agree on one thing. Participants entering mediation at least deserve to know when they will be, and will not be, creating new admissible evidence. To help ensure this, California Rule of Court 3.854(b) requires that in any court-connected mediation, "At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings." Unless sought in a later criminal or quasi-criminal proceeding, this generally means "all communications...between participants...shall remain confidential" per Evidence Code section 1119(c).

At the Commission's last meeting on February 2, 2017, there appeared to be significant differences on the Commission's intent. I respectfully request that a Commissioner ask for a clear vote on the following question.

**Does the Commission seek to permit a dissatisfied client, and her/his accused attorney, to:**

**a) subpoena all opposing parties to produce all confidential mediation briefs, offers, admissions, potential resolutions and other electronic communications with their mediator, and to**

**b) subpoena all opposing parties to repeat their mediation communications under oath in depositions,**

**if the client or attorney can reasonably represent they are seeking to discover evidence relevant to their later malpractice claims or defenses?**

If the answer to the above question is yes, then it appears the Commission seeks to fundamentally change what participating in mediation has meant under California law since 1985. If it does, then I respectfully request a Commissioner move that the new proposed statute include a mandatory Miranda-like warning in clear simple language. This will help prevent participants from unknowingly revealing damaging information in mediation. It will help satisfy the intent of informed consent rules such as Rule 3.854(b) cited above. I request that an accurate consumer protection warning such as the following be required to be provided at the outset of all mediations involving counsel.

**Warning!**

**Anything you say in mediation you may be subpoenaed to repeat under oath  
if any of the other parties later complains against their lawyer.**

**You may also have to give them any documents we create in mediation,  
and any texts or emails we send.**

cc Hon. David W. Long, California Judges Association  
Ms. Heather Anderson, California Judicial Council

Respectfully submitted,  
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# Committee on Mandatory Fee Arbitration

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The State Bar of California  
180 Howard Street  
San Francisco, CA 94105

March 13, 2016

VIA EMAIL ONLY-bgaal@clrc.ca.gov

Barbara Gaal  
Chief Deputy Counsel  
California Law Revision Commission

Dear Ms. Gaal:

As members of the State Bar Committee on Mandatory Fee Arbitration, we respond to the request in the Commission's Memorandum 2016-58. In the Memorandum at page 25, the Staff requested comments on whether the exception to mediation confidentiality in the draft legislation (proposed Evidence Code Section 1120.5) should apply to attorney-client fee disputes.

Our Committee was established in 1984 and oversees 29 approved local bar association programs and the State Bar's program. The Committee ensures that all programs follow the *Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs* adopted by the State Bar Board of Trustees. The Committee also has the responsibility for training volunteer attorneys and laypersons throughout the State to serve as arbitrators in mandatory fee arbitrations; drafts and publishes Arbitration Advisories on the State Bar website to educate arbitrators and programs on mandatory fee arbitration rules; and reviews statutes and case law concerning issues relating to mandatory fee arbitrations. Members of the Committee have served as voluntary arbitrators in countless mandatory fee arbitrations throughout the years.

If the Commission decides to recommend to the legislature that an exception to mediation confidentiality be created, our Committee believes the exception should apply to disputes between an attorney and client concerning fees, costs, or both, including proceedings under the State Bar Act, Chapter 4, Article 13-Arbitration of Attorneys' Fees as set forth in Business and Professions Code Sections 6200-6206.

On page 18 of the Commission's Memorandum 2016-58, this issue was framed as follows: "Whether the exception should apply in a dispute relating to an attorney-client fee agreement, not just in a State Bar disciplinary proceeding and a legal malpractice case." In reviewing Memorandum 2016-58, it appears the Commission intends to only apply the proposed exception in a legal malpractice case or in a State Bar disciplinary proceeding. (Memorandum, p. 19, 24-25)

The draft minutes of the Commission's December 1, 2016 meeting also state: "Proposed Evidence Code Section 1120.5(a)(2) in the Discussion Draft is satisfactory. No revisions of it are

needed to address attorney-client fee disputes.” The Commission’s conclusion appears to be based, at least in part, on *Lee v. Hanley*, 61 Cal. 4th 1225 (2015), and the concept that “*some but not all attorney-client fee disputes are legal malpractice claims*, at least within the meaning of the provision commonly referred to as the statute of limitations for legal malpractice.” (Memorandum 2016-58, page 24, emphasis in original.)

The question of whether an attorney-client fee dispute (by itself) is also a legal malpractice claim is separate from the question of evidence that is admissible in the attorney-client fee dispute. If the proposed exception to mediation confidentiality is created, we believe the exception should apply to disputes between an attorney and client concerning fees, costs, or both (“attorney-client fee disputes”). These proceedings – even though they are not by themselves legal malpractice cases or disciplinary proceedings – can involve claims of legal malpractice or professional misconduct that take place in the context of a mediation or mediation consultation. Moreover, under Business & Professions Code Section 6203(a), which is part of the Mandatory Fee Arbitration Act: “Evidence relating to claims of malpractice and professional misconduct, shall be admissible only to the extent that those claims bear upon the fees, costs, or both, to which the attorney is entitled. The arbitrators shall not award affirmative relief, in the form of damages or offset or otherwise, for injuries underlying the claim.”

Based on this statute, the fee arbitrator may decide the value of the attorneys services were lessened and can reduce the claimed fees, costs or both, based upon evidence of malpractice or professional misconduct presented in the fee arbitration and in no other proceeding. In fact, under Business & Professions Code Section 6201(d)(2), a client’s right to request or maintain arbitration under the Mandatory Fee Arbitration Act is waived if the client commences an action seeking “[a]ffirmative relief against the attorney for damages or otherwise based upon alleged malpractice or professional misconduct.”

In the committee’s experience with attorney-client fee disputes, arbitrators have been presented with cases involving allegations of legal malpractice or professional misconduct occurring in mediations. For example, there can be claims the attorney made a legally significant error when the attorney induced the client to settle for a lower amount, the attorney agreed to modify the written fee agreement and lower the fee and then reneged, the attorney agreed to resolve liens in the case and then failed to settle with the lienholder, the attorney agreed to absorb all the costs incurred and then required the client to pay all costs out of his or her share of the settlement, or the attorney failed to explain the tax ramifications of the proposed settlement. Under existing law, in these and similar cases, the arbitrator is not able to consider evidence concerning communications made in preparation for or in the course of a mediation or mediation consultation in order to making findings and the award.

As required under proposed Evidence Code Section 1120.5(a)(1), this evidence would be “relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.” If attorney-client fee disputes are not included in the proposed legislation, an anomalous situation would be created whereby evidence would be admissible in a legal malpractice case or a State Bar disciplinary proceeding, but the *identical* evidence would not be admissible in the context of an attorney-client fee dispute, notwithstanding Business & Professions Code Section 6203(a).

We believe there is no sound basis for drawing that distinction. Therefore, if an exception to mediation confidentiality is to be created, we propose the draft legislation include attorney-client fee disputes as a third category in which the exception would apply. The language we propose is set forth below in paragraph (C).

"(2) the evidence is sought or proffered in connection with and used solely in resolving one of the following:

(A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business & Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice."

ADD paragraph (C)

(C) A dispute between a lawyer and client concerning fees, costs, or both including a proceeding under the State Bar Act, Chapter 4, Article 13-Arbitration of Attorneys' Fees, Business & Professions Code Sections 6200-6206.

We thank you for the opportunity to provide these comments and hope they will benefit the Commissions' study.

**Disclaimer**

**This position is only that of the State Bar of California's Standing Committee on Mandatory Fee Arbitration. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.**

Sincerely yours,

*Lorraine Walsh*

For the Committee on Mandatory Fee Arbitration  
Lorraine M. Walsh, Vice-Chair

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

<h2>STAFF DRAFT</h2>
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TENTATIVE RECOMMENDATION

## Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct April 2017

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN \_\_\_\_\_.

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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## SUMMARY OF TENTATIVE RECOMMENDATION

Mediation is a popular, widely-used dispute resolution technique, in which a neutral person facilitates communication between disputants to assist them in reaching a mutually acceptable agreement. Many sources maintain that robust, uninhibited discussions are crucial to effective mediation.

To promote such discussions, existing law makes mediation communications and writings confidential and generally precludes the use or disclosure of a mediation communication or writing in a subsequent noncriminal case. This gives mediation participants some degree of assurance that what they say in a mediation will not later come back to hurt them.

Occasionally, however, a mediation participant alleges that the participant's attorney committed malpractice or engaged in other misconduct during a mediation. The law protecting mediation communications and writings might impede a court in evaluating such a claim and rendering a just decision.

By resolution (2012 Cal. Stat. res. ch. 108), the Legislature directed the Commission to analyze "the relationship under current law between mediation confidentiality and attorney malpractice and other misconduct ...." The Legislature asked the Commission to address "the purposes for, and impact of, those laws on public protection, professional ethics, attorney discipline, client rights, the willingness of parties to participate in voluntary and mandatory mediation, and the effectiveness of mediation ...."

The Legislature also instructed the Commission to consider certain Evidence Code provisions and their predecessors, the availability and propriety of contractual waivers, the law in other jurisdictions (including the Uniform Mediation Act and other statutory acts), scholarly commentary, judicial decisions in California and elsewhere, and any data regarding the impact of differing confidentiality rules on the use of mediation. The Legislature authorized the Commission to "make any recommendations that it deems appropriate for the revision of California law to balance the competing public interests between confidentiality and accountability."

Part I of this report summarizes the Commission's research for this study, including its work on the matters requested by the Legislature. Part II explains the Commission's preliminary conclusions, which are the basis for the proposed legislation presented in Part III of the report.

Based on its review of the relevant law, policy considerations, and empirical evidence, the Commission tentatively recommends the creation of a new exception to mediation confidentiality. The proposed new exception is designed to hold attorneys accountable for misconduct in the mediation process, while also allowing attorneys to effectively rebut meritless misconduct claims.

This recommendation was prepared pursuant to Resolution Chapter 150 of the Statutes of 2016.

## Contents

RELATIONSHIP BETWEEN MEDIATION CONFIDENTIALITY AND ATTORNEY MALPRACTICE AND OTHER MISCONDUCT .....	1
PART I. RESEARCH FINDINGS .....	3
Assembly Bill 2025 and the Inception of the Commission’s Study .....	3
Scope of Study .....	5
Terminology .....	7
“Mediation Confidentiality” .....	7
“Mediation Privilege” .....	8
Key Policy Considerations .....	9
Key Policy Underlying Mediation Confidentiality .....	9
Special Considerations Relating to Mediator Testimony .....	14
Key Reasons For Permitting Disclosure of Mediation Communications To Establish Attorney Misconduct .....	16
Clash of Key Policies .....	22
California Law on Mediation Confidentiality .....	23
History of California’s Statutory Scheme .....	23
Current Statutory Framework .....	27
California Supreme Court Decisions on Mediation Confidentiality .....	33
Other Decisions on the Intersection of Mediation Confidentiality and Alleged Attorney Misconduct Under California Law .....	41
Law of Other Jurisdictions .....	49
Uniform Mediation Act .....	49
Other States .....	59
Federal Law .....	70
Empirical Evidence .....	70
Scholarly Views .....	70
Possible Approaches .....	70
PART II. PRELIMINARY CONCLUSIONS .....	71
Proposed New Exception to Mediation Confidentiality .....	71
Limitations to Protect the Policies Underlying Mediation Confidentiality .....	71
Other Features of the Proposed New Exception .....	76
Request For Comments .....	77
PART III. PROPOSED LEGISLATION .....	79
Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when representing client in mediation context .....	79
Uncodified (added). Operative date .....	81



RELATIONSHIP BETWEEN MEDIATION  
CONFIDENTIALITY AND ATTORNEY  
MALPRACTICE AND OTHER MISCONDUCT

1 California's court system is one of the largest in the world, handling millions of  
2 cases every year.<sup>1</sup> Many of those cases are resolved through mediation (court-  
3 connected or private),<sup>2</sup> a process in which a neutral person facilitates  
4 communication between disputants to assist them in reaching a mutually  
5 acceptable agreement.<sup>3</sup> Mediation is also widely used to resolve disputes without  
6 resorting to litigation.<sup>4</sup>

7 There is broad consensus that open and frank discussion among mediation  
8 participants is critical to effective mediation.<sup>5</sup> To promote such discussion,  
9 existing California law provides strong protection for mediation communications  
10 and writings: they are considered "confidential" and they are generally  
11 inadmissible and protected from disclosure in a noncriminal case.<sup>6</sup> This gives

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1. Judicial Council of California, *2016 Court Statistics Report: Statewide Caseload Trends (2005-2006 Through 2014-2015)*, at Preface & xvii. California courts processed about 6.8 million cases in fiscal year 2014-2015, the most recent year for which data is available.

2. See discussion of "Empirical Evidence" *infra*.

3. Evid. Code § 1115.

4. See, e.g., CLRC Staff Memorandum 2016-58, Exhibit p. 12 (comments of Mary B. Culbert, on behalf of Loyola Law School Center for Conflict Resolution) ("Los Angeles County alone serves around 20,000 people each year in its DRPA-Funded Community-Based Mediation Programs, which we estimate accounts for approximately 1/5 of all those served by DRPA-Funded Mediation Programs throughout the state (100,000 people total — this number is an extrapolation from Los Angeles County data).").

All staff memoranda and other Commission materials cited in this report are available on its website ([www.clrc.ca.gov](http://www.clrc.ca.gov)).

5. See, e.g., *Blackmon-Malloy v. Unites States Capitol Police Bd.*, 575 F.3d 699, 711 (D.C. Cir. 2009) ("Congress understood what courts and commentators acknowledge, namely, that confidentiality plays a key role in the informal resolution of disputes."); *Sheldone v. Pennsylvania Turnpike Comm'n*, 104 F. Supp. 2d 511, 513 (W.D. Pa. 2000) ("Both federal and state courts have recognized that confidentiality is essential to the mediation process.... The need for confidence and trust in the mediation process is further evidenced by federal statute, the local rules of federal district courts ..., and state statutes from across the country."); National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act* (2001) (hereafter, "UMA"), at Prefatory Note ("Candor during mediation is encouraged by maintaining the parties' and mediators' expectations regarding confidentiality of mediation communications.... Virtually all state legislatures have recognized the necessity of protecting mediation confidentiality."); Sarah Rudolph Cole, *Secrecy and Transparency in Dispute Resolution: Protecting Confidentiality in Mediation: A Promise Unfulfilled?*, 54 Kan. L. Rev. 1419, 1425 (2006) ("Legislators, courts, and commentators generally agree that maintaining confidentiality of mediation communications and documents prepared for mediation is essential to the success of the mediation process.").

6. See Evid. Code § 1119; see also Evid. Code § 703.5, 1115-1128.

1 mediation participants some degree of assurance that what they say in mediation  
2 will not later be used to their detriment.<sup>7</sup>

3 Suppose, however, that a mediation participant wants to prove that the  
4 participant's attorney committed malpractice or engaged in other misconduct  
5 during a mediation.<sup>8</sup> In that situation, the statutory protection for mediation  
6 communications and writings may make it difficult for a court to properly assess  
7 the merits of the participant's claim and render a just decision.

8 Due to these competing considerations, the Legislature directed the Commission  
9 to analyze "the relationship under current law between mediation confidentiality  
10 and attorney malpractice and other misconduct ...."<sup>9</sup> The Legislature requested  
11 extensive background research on the topic, in specific areas.<sup>10</sup>

12 Part I of this report summarizes the Commission's research for this study so far,  
13 including its work on the matters requested by the Legislature. Part II presents the  
14 Commission's preliminary conclusions, which are the basis for the proposed  
15 legislation presented in Part III of the report.

16 Based on its review of the relevant law, policy considerations, and empirical  
17 evidence, the Commission tentatively recommends the creation of a new exception  
18 to California's mediation confidentiality law. The proposed new exception is  
19 designed to hold attorneys accountable for misconduct in the mediation process,  
20 while also allowing attorneys to effectively rebut meritless misconduct claims.

21 **The Commission invites interested persons to comment on any aspect of**  
22 **this tentative recommendation.** It is just as important to express support for  
23 material in the report as it is to indicate areas of disagreement or concern.

24 The Commission will carefully consider any comments and might revise its  
25 recommendation in response to them. Thus, this tentative recommendation is not  
26 necessarily the recommendation that the Commission will submit to the  
27 Legislature.

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7. See, e.g., *Cassel v. Superior Court*, 51 Cal. 4th 113, 131, 244 P.2d 1080, 119 Cal. Rptr. 3d 437 (2011) (principal purpose of mediation confidentiality statutes "is to assure prospective participants that their interests will not be damaged, first by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement.").

8. See, e.g., *id.* at 118.

9. ACR 98 (Wagner), 2012 Cal. Stat. res. ch. 108.

10. See *id.*

## PART I. RESEARCH FINDINGS

In this part of its report, the Commission provides some background information and then describes the extensive research it has conducted for this study. The discussion is organized as follows:

	<i>Page</i>
Assembly Bill 2025 and the Inception of the Commission’s Study .....	3
Scope of Study .....	5
Terminology .....	7
Key Policy Considerations .....	9
California Law on Mediation Confidentiality .....	23
Law of Other Jurisdictions .....	49
Empirical Evidence .....	70
Scholarly Views .....	70
Possible Approaches .....	70

## Assembly Bill 2025 and the Inception of the Commission’s Study

In *Cassel v. Superior Court*,<sup>11</sup> the California Supreme Court held that California’s mediation confidentiality statutes must be strictly construed and are not subject to a judicially-crafted exception where a client sues for legal malpractice and seeks disclosure of private attorney-client discussions relating to a mediation.<sup>12</sup> The Court said that the statutory terms “must govern, even though they may compromise” a client’s ability to prove legal malpractice.<sup>13</sup>

Reaction to the *Cassel* ruling in 2011 was decidedly mixed. Some groups and individuals praised the decision, while others sharply criticized it.

In particular, the Conference of California Bar Associations (“CCBA”)<sup>14</sup> concluded that the mediation confidentiality statutes should be amended to overturn the *Cassel* result.<sup>15</sup> At CCBA’s urging, a bill was introduced to create a new statutory exception.<sup>16</sup> The proposed exception stated that the mediation confidentiality statutes *do not limit* the

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11. 51 Cal. 4th at 118-19.

12. See *id.* at 123-33.

13. *Id.* at 119. For further information on *Cassel*, see discussion of “California Supreme Court Decisions on Mediation Confidentiality” *infra*.

14. CCBA is a non-profit corporation comprised of numerous local, minority, statewide and specialty voluntary bar associations in California. See <http://calconference.org/html/about-2/ccba-fact-sheet>.

15. See CCBA Resolution 10-06-2011 (reproduced in CLRC Staff Memorandum 2013-39, Exhibit pp. 10-12).

16. See AB 2025 (Wagner), as introduced on Feb. 23, 2012.

1 admissibility, in a State Bar disciplinary action, an action for legal malpractice,  
2 and/or an action for breach of fiduciary duty, of communications directly between  
3 the client and his or her attorney, only, where professional negligence or  
4 misconduct form the basis of the client's allegations against the client's  
5 attorney.<sup>17</sup>

6 The bill immediately prompted significant opposition.<sup>18</sup> It was therefore  
7 amended to direct the Commission to conduct this study.<sup>19</sup> The amended content  
8 of the bill was later transferred to the Commission's biennial resolution of  
9 authority, which was passed by the Legislature.<sup>20</sup>

10 The resolution states in pertinent part:

11 *Resolved*, That the Legislature approves for study by the California Law  
12 Revision Commission the new topic listed below:

13 (a) Analysis of the relationship under current law between mediation  
14 confidentiality and attorney malpractice and other misconduct, and the purposes  
15 for, and impact of, those laws on public protection, professional ethics, attorney  
16 discipline, client rights, the willingness of parties to participate in voluntary and  
17 mandatory mediation, and the effectiveness of mediation, as well as any other  
18 issues that the commission deems relevant. Among other matters, the commission  
19 shall consider the following:

20 (1) Sections 703.5, 958, and 1119 of the Evidence Code and predecessor  
21 provisions, as well as California court rulings, including, but not limited to, *Cassel*  
22 *v. Superior Court* (2011) 51 Cal.4th 113, *Porter v. Wyner* (2010) 183 Cal.App.4th  
23 949, and *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137.

24 (2) The availability and propriety of contractual waivers.

25 (3) The law in other jurisdictions, including the Uniform Mediation Act, as it  
26 has been adopted in other states, other statutory acts, scholarly commentary,  
27 judicial decisions, and any data regarding the impact of differing confidentiality  
28 rules on the use of mediation.

29 (b) In studying this matter, the commission shall request input from experts and  
30 interested parties, including, but not limited to, representatives from the California  
31 Supreme Court, the State Bar of California, legal malpractice defense counsel,  
32 other attorney groups and individuals, mediators, and mediation trade  
33 associations. The commission shall make any recommendations that it deems  
34 appropriate for the revision of California law to balance the competing public  
35 interests between confidentiality and accountability.<sup>21</sup>

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17. See *id.* at 2.

18. When the Commission began working on this study, mediator Ron Kelly provided the Commission with a set of the support and opposition letters pertaining to AB 2025 (Wagner), as introduced on Feb. 23, 2012. His cover letter and enclosures are available on the Commission's website (see <http://www.clrc.ca.gov/pub/Misc-Report/AM-K402-9:21:12.pdf>).

19. See AB 2025 (Gorell), as amended in Assembly, May 10, 2012.

20. See ACR 98 (Wagner), 2012 Cal. Stat. res. ch. 108.

21. See *id.* at 4.

## Scope of Study

The legislative resolution asks the Commission to analyze “the relationship under current law between mediation confidentiality and *attorney malpractice and other misconduct* ...” To determine the proper scope of this study, the Commission had to resolve (1) which types of misconduct to consider and (2) whether to focus only on misconduct *in a mediation context*, as opposed to misconduct more generally.

Many different types of bad behavior could theoretically occur during a mediation.<sup>22</sup> In addition, mediation communications might provide evidence relating to misconduct that occurred earlier than, or separate and apart from, the mediation process.<sup>23</sup>

The legislative resolution directing this study contains several references to attorneys, attorney misconduct, and attorney organizations. It also refers specifically to “professional ethics” and “client rights,” suggesting a focus on misconduct in a professional capacity.<sup>24</sup> In addition, the resolution refers to Evidence Code Section 958, which relates to “an issue of breach, by the *lawyer* or by the client, of a duty arising out of the *lawyer-client* relationship.”<sup>25</sup>

22. At one extreme, a mediation participant could commit a criminal act while attending a mediation session (such as assaulting another participant or stealing something from another participant’s unattended briefcase). Importantly, the code provisions that restrict the admissibility and disclosure of mediation communications and writings only apply in a noncriminal proceeding (see Evid. Code §§ 1119(a), (b)), and only apply to conduct that is intended as an assertion (see, e.g., *Radford v. Shehorn*, 187 Cal. App. 4th 852, 857, 114 Cal. Rptr. 3d 499 (2010)).

At another extreme, a mediation participant might be faulted for failing to comply with a court order requiring mediation. Some types of noncompliance with such an order (such as failing to attend a mediation or bring a required representative) might be subject to proof without delving into mediation communications. See, e.g., *Foxgate Homeowners’ Ass’n v. Bramalea California, Inc.*, 26 Cal. 4th 1, 15, 25 P.3d 1117, 128 Cal. Rptr. 2d 642 (2001). Other times, a charge of noncompliance might be based on a participant’s failure to make a settlement offer. Such a charge would be groundless, because a mediated settlement agreement must be voluntary and a mediation participant is entitled to withdraw from mediation at any time. See Evid. Code § 1115(a); Cal. R. Ct. 3.853; see generally *Gaines v. Fidelity Nat’l Title Ins. Co.*, 62 Cal. 4th 1081, 1103, 365 P.3d 904, 199 Cal. Rptr. 3d 137 (2016); *Jeld-Wen, Inc. v. Superior Court*, 146 Cal. App. 4th 536, 540-41, 53 Cal. Rptr. 3d 115 (2007); 6 B. Witkin, *Cal. Procedure Proceedings Without Trial* § 486, p. 942 (5th ed. 2008).

In between these extremes, a mediation participant might engage in nonviolent behavior that could be subject to criminal penalties but usually is only pursued civilly (e.g., fraud or some types of extortion). A mediation participant could also engage in noncriminal misconduct at a mediation, such as negligence.

Of particular note, a professional attending a mediation might violate a professional duty or rule, or fail to comply with a professional standard of care. Depending on the applicable professional requirements, this type of misconduct could be committed by any type of professional: The mediator, the attorneys representing clients at the mediation, or a doctor, accountant, insurer, contractor, engineer, or other professional providing advice or otherwise acting in a professional capacity.

23. See, e.g., *Rinaker v. Superior Court*, 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998).

24. For the text of the resolution with the pertinent terms italicized, see Commission Staff Memorandum 2015-34, pp. 5-6.

25. Evid. Code § 958 (emphasis added).



1 Importantly, the resolution singles out *Cassel* and two other California cases for  
2 particular attention. Each of those cases involved the intersection of mediation  
3 confidentiality and alleged *attorney* misconduct in a *professional* capacity in a  
4 *mediation context*.<sup>26</sup>

5 The history of the resolution provides further insight into the intended scope of  
6 study. Like the cases just discussed, that history suggests that the Commission  
7 should study and provide a recommendation on the relationship between  
8 mediation confidentiality and alleged *attorney* misconduct in a *professional*  
9 capacity in a *mediation context* (including, but not limited to, legal malpractice).<sup>27</sup>

10 This tentative recommendation focuses on that topic. In taking that approach,  
11 the Commission recognized that the Legislature gave it wide rein to choose the  
12 best means of addressing the topic.<sup>28</sup> Because the area is controversial, it seemed  
13 prudent to stick closely to the assigned topic.

14 Of necessity, however, the Commission’s research for this study has been more  
15 wide-ranging. The available research materials are not organized in a manner  
16 facilitating a focus on alleged professional misconduct of attorneys in a mediation  
17 setting. In addition, materials involving other types of mediation misconduct (such  
18 as alleged mediator misconduct or alleged misconduct by other mediation  
19 participants, particularly professionals) could be instructive by way of analogy.  
20 Thus, this tentative recommendation describes some research in those areas, as  
21 well as research on the specific topic at hand.<sup>29</sup>

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26. In *Cassel*, the plaintiff “sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract” in representing him in a mediation. 51 Cal. 4th at 118. He alleged that “by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth. *Id.*”

Similarly, in *Porter v. Wyner*, the plaintiffs sued their law firm for “legal malpractice, breach of fiduciary duty, constructive fraud, negligent misrepresentation, breach of fee agreement, rescission, unjust enrichment and liability for unpaid wages.” 107 Cal. Rptr. 3d 653, 658 (2010) (footnote omitted) (formerly published at 183 Cal. App. 4th 949). The plaintiffs claimed that the firm gave them incorrect tax advice in connection with a mediated settlement agreement, failed to pay them part of the attorney fee portion of the settlement proceeds as promised during the mediation, and failed to compensate one of the plaintiffs for services rendered as a paralegal. See *id.* at 655-57.

The third case cited in the legislative resolution is *Wimsatt v. Superior Court*, 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200 (2007). This was another attorney-client dispute relating to a mediation. The plaintiff alleged that his law firm breached its fiduciary duty by making a low settlement demand against his wishes on the eve of a mediation, which ultimately compromised the plaintiff’s ability to obtain a satisfactory settlement. See *id.* at 202-04, 206.

These cases are described in greater detail later in this tentative report. See the discussions of “California Supreme Court Decisions on Mediation” and “Other Decisions on the Intersection of Mediation Confidentiality and Attorney Misconduct Under California Law” *infra*.

27. See CLRC Staff Memorandum 2015-34 & sources cited therein.

28. The last sentence of the legislative resolution authorizes the Commission to “make *any recommendations that it deems appropriate* for the revision of California law to balance the competing public interests between confidentiality and accountability.” See ACR 98 (Wagner), 2012 Cal. Stat. res. ch. 108 (emphasis added).

29. For further analysis regarding the scope of this study, see CLRC Staff Memorandum 2015-34.

## Terminology

A few words about terminology may be helpful before turning to the substance of this study. In particular, there are some complexities relating to the terms “mediation confidentiality” and “mediation privilege.”

### “Mediation Confidentiality”

Courts and commentators often use the term “mediation confidentiality” loosely, to refer to one or more of the following types of protection for mediation communications (oral or written):

- (1) A statute or rule making mediation communications inadmissible in a legal proceeding.
- (2) A statute or rule preventing compelled discovery or disclosure of mediation communications in a legal proceeding.
- (3) A statute or rule providing that mediation communications must be kept confidential and not disclosed to anyone (i.e., true confidentiality).
- (4) A statute or rule precluding a mediator from testifying about a mediation.
- (5) A contractual agreement between mediation participants to keep mediation communications confidential to a specified extent.<sup>30</sup>

Such usage may result in confusion about the type of protection at stake.<sup>31</sup>

Ideally, it might be best to use the term “mediation confidentiality” only for a true confidentiality requirement (Item #3 or Item #5). In practice, however, the looser usage is so widespread, engrained, and comparatively convenient that it is hard to avoid.<sup>32</sup>

For that reason, this tentative recommendation often uses the term “mediation confidentiality” in the broader sense. Nonetheless, the Commission tried to be

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30. Among other things, such an agreement might prohibit a mediator from telling other mediation participants what a person said during a private caucus with the mediator.

31. For example, the New York State Bar Association’s Committee on Alternative Dispute Resolution had the following comments about the Uniform Mediation Act:

Despite its name, the UMA is an Act that addresses only whether mediation communications are discoverable or admissible in legal proceedings. Other than preserving the rights of parties to contract for confidentiality, it does not prescribe any rules governing confidentiality generally. Although it is debatable whether the UMA should be more comprehensive, the important fact for legislators and others in the legal community to remember is that the UMA is a very narrow Act addressing only the issue of privilege. *That many of those who would be impacted by the Act had and likely still have a misperception about the scope and purpose of the Act, was one of the first indications to the ADR Committee that a thorough and detailed analysis of the Act was needed.*

N.Y. State Bar Ass’n Committee on ADR, *The Uniform Mediation Act and Mediation in New York*, p. 3 (Nov. 1, 2001) (emphasis added).

32. There does not seem to be another commonly-accepted, shorthand way to refer to Items #1-#5. The phrase “protection of mediation communications” is a possible alternative, but it can be prohibitively cumbersome.

1 mindful of the potential for confusion and to employ more precise language when  
2 that appeared necessary.

3 **“Mediation Privilege”**

4 A second terminological issue concerns references to a “mediation privilege.” In  
5 California, Division 8 of the Evidence Code<sup>33</sup> contains the state’s evidentiary  
6 privileges, such as the lawyer-client privilege and the physician-patient privilege.  
7 Certain general rules apply to those privileges.<sup>34</sup>

8 Importantly, the statutory provisions protecting mediation communications are  
9 not located with the evidentiary privileges. Rather, most of them are located in  
10 Division 9 of the Evidence Code,<sup>35</sup> which is entitled “Evidence Affected or  
11 Excluded by Extrinsic Policies.”<sup>36</sup>

12 Consequently, it is improper to refer to those provisions as California’s  
13 “mediation privilege.”<sup>37</sup> Likewise, the general rules that apply to California’s  
14 evidentiary privileges do not necessarily apply to its mediation confidentiality  
15 provisions.<sup>38</sup>

16 In some contexts, however, California’s mediation confidentiality provisions are  
17 functionally equivalent to an evidentiary privilege and are treated as such. For  
18 example, federal courts have taken that approach in analyzing choice-of-law issues  
19 under Federal Rule of Evidence 501.<sup>39</sup>

20 It is also important to bear in mind that the consequences of being classified as  
21 an evidentiary “privilege” may vary from jurisdiction to jurisdiction. In  
22 jurisdictions using the Uniform Mediation Act, for example, the protection for  
23 mediation communications is denominated a “privilege,”<sup>40</sup> yet the circumstances

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33. Evid. Code §§ 900-1070.

34. For example, there is an implied waiver provision, under which almost every evidentiary privilege is implicitly waived if the holder of the privilege voluntarily discloses, or consents to disclosure of, a significant part of an otherwise privileged communication. See Evid. Code § 912. For additional examples, see Evid. Code §§ 911, 913-920.

35. Evid. Code §§ 1100-1161.

36. See Evid. Code §§ 1115-1128. The provision governing a mediator’s competency to testify (Evid. Code § 703.5) is located in Division 6 of the Evidence Code, which is entitled “Witnesses.”

37. See, e.g., *Cassel*, 51 Cal. 4th at 132 (“[T]he mediation confidentiality statutes do not create a ‘privilege’ in favor of any particular person.”); *Wimsatt*, 152 Cal. App. 4th at 150 n.4 (“[T]he mediation confidentiality rules are not ‘privileges’ in the traditional sense ....”).

38. For example, a waiver of mediation confidentiality under California law must be express, not implied. See *Simmons v. Ghaderi*, 44 Cal. 4th 570 187 P.3d 934, 80 Cal. Rptr. 3d 83 (2008).

39. See, e.g., *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110, 1120 n.15 (N.D. Cal. 1999) (“We decline to accept ... the notion that the proviso of F.R.E. 501 does not apply whenever a state fails formally to label the protection it offers to mediation communications a ‘privilege’ using instead language that promises and mandates confidentiality. We would view such an analytical out as little more than a semantic slight of hand.”).

40. See UMA § 4 & Comment.

1 under which it can be implicitly waived by disclosure are more limited than the  
2 circumstances for implicitly waiving one of the privileges in Division 8 of the  
3 Evidence Code.<sup>41</sup> It is thus necessary to use great care in describing and discussing  
4 the effects of a “privilege” in the mediation context.

### Key Policy Considerations

5 Before examining existing law on mediation confidentiality, it may be helpful to  
6 identify some of the key policy considerations at stake in this study of the  
7 relationship between mediation confidentiality and attorney misconduct. This  
8 section of the Commission’s report describes some of those policy considerations,  
9 without attempting to weigh them or otherwise assess their merits. A later section  
10 of the report focuses on the availability of empirical evidence relating to the  
11 pertinent policy considerations (or lack thereof).<sup>42</sup> At the end of this report (Parts  
12 II and III), the Commission explains its balancing and proposed treatment of the  
13 competing considerations.

#### Key Policy Underlying Mediation Confidentiality

14 It is first important to understand the policy basis underlying the existing  
15 protections for mediation confidentiality. The main policy argument for mediation  
16 confidentiality rests on four key premises:  
17

- 18 (1) Confidentiality promotes candor in mediation.
- 19 (2) Candid discussions lead to successful mediation.
- 20 (3) Successful mediation encourages future use of mediation to resolve  
21 disputes.
- 22 (4) The use of mediation to resolve disputes is beneficial to society.

23 Each premise is discussed in order below.

#### *Confidentiality Promotes Candor in Mediation*

24 Like the constitutional guarantees of free speech, mediation confidentiality is  
25 meant to foster productive debate and discussion, but only in a particular setting  
26 among a select group of participants. As the Uniform Law Commission (“ULC”)  
27 explains in the Uniform Mediation Act,  
28

29 mediators typically promote a candid and informal exchange regarding events in  
30 the past, as well as the parties’ perceptions of and attitudes toward these events,

---

41. Compare UMA § 5 & Comment (UMA privilege cannot be implicitly waived by disclosure unless disclosure prejudices another mediation participant) with Evid. Code § 912 (establishing less stringent standard for waiver by disclosure, as described in *supra* note 34).

In contrast to those provisions, California’s mediation confidentiality protections cannot be implicitly waived, regardless of the circumstances. See *supra* note 38.

42. See discussion of “Empirical Evidence” *infra*.

1 and ... encourage parties to think constructively and creatively about ways in  
2 which their differences might be resolved. This frank exchange can be achieved  
3 only if the participants know that what is said in the mediation will not be used to  
4 their detriment through later court proceedings and other adjudicatory processes.<sup>43</sup>

5 Numerous other sources likewise maintain that assurance of confidentiality is  
6 crucial to promote frank discussion among mediation participants.<sup>44</sup> They explain  
7 that without such assurance, participants may be reluctant to speak freely, for fear  
8 of later having their words used against them.<sup>45</sup>

9 ***Candid Discussions Lead To Successful Mediation***

10 It is also widely believed that the more candid and open parties are during a  
11 settlement discussion, the more likely a successful settlement becomes.<sup>46</sup> Talking  
12 freely may help disputants understand each other's position, which may in turn  
13 promote settlement.<sup>47</sup> Similarly, a forthright apology or other honest gesture of  
14 conciliation may help lead to a settlement.<sup>48</sup>

---

43. UMA, *supra* note 5, at Prefatory Note.

44. See, e.g., *Fair v. Bakhtiari*, 40 Cal. 4th 189, 194, 147 P.3d 653, 51 Cal. Rptr. 3d 871 (2006) (mediation confidentiality provisions of Evidence Code "were enacted to encourage mediation by permitting the parties to frankly exchange views, without fear that disclosures might be used against them in later proceedings"); *Foxgate*, 26 Cal. 4th at 15 (purpose of confidentiality is to promote candid and informal exchange regarding past events); Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 Geo. L.J. 2663, 2663-64 (1995) (when representatives in dispute have constituencies with widely different views of case, and meeting with "enemy" itself is considered signal of weakness, negotiations will not occur unless they can be held in privacy); CLRC Staff Memorandum 2015-54, Exhibit pp. 1-2 (comments of Donald Proby, on behalf of Ass'n for Dispute Resolution of Northern California) (Mediation confidentiality provisions "allow the parties to be open and transparent during negotiations without fear of later repercussions.").

45. "If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute." *Sheldone v. Pennsylvania Turnpike Comm'n*, 104 F. Supp. 2d 511, 513 (W.D. Pa. 2000), *quoting* *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979).

46. See, e.g., *Cassel*, 51 Cal. 4th at 132-33 (Mediation confidentiality assures mediation participants that "their interests will not be damaged ... by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement."); Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings L.J. 955, 959 (1988) ("Rationality promotes settlement and respect for the system, and openness of communication is essential to rationality."); Kerwin, Note, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond*, 12 Rev. Litig. 665, 665 (1983) ("It is only natural that the more candid and open parties are during settlement proceedings, the more likely their efforts are to be successful.").

47. See, e.g., *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations*, 29 Cal. L. Revision Comm'n Reports 345, 351 (1999) ("A frank settlement discussion can help disputants understand each other's position and improve prospects for a successful, mutually satisfactory settlement of the dispute."); see also Brazil, *supra* note 46, at 959 (broad protection of settlement negotiations may "enhance the rationality of the negotiation process and improve the likelihood that litigants will understand the basis

1 It might not be enough for parties to communicate frankly with the mediator; it  
2 might also be necessary for them to be frank with each other.<sup>49</sup> Unless they can  
3 overcome their wariness about disclosing information to each other, they might  
4 not be able to find common ground and resolve their dispute.<sup>50</sup>

5 Similarly, reaching a resolution might require candid, robust discussion from  
6 other mediation participants. For example, an attorney might learn new  
7 information in a mediation or see a client start to accept unpleasant realities. When  
8 caucusing in private, the attorney might encourage the client to settle for less than  
9 what the client thought was reasonable before the mediation. Such blunt advice  
10 might lead the client to accept a settlement that is in the client's best interest.<sup>51</sup>  
11 Without assurance of confidentiality, however, the attorney might be reluctant to  
12 recommend such a settlement,<sup>52</sup> for fear that the client will later have buyer's  
13 remorse and blame the attorney.<sup>53</sup>

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for the proposals that are put on the table; litigants would thus feel good about the terms they finally accept.”).

48. See, e.g., *id.*; CLRC Staff Memorandum 2015-45, Exhibit p. 26 (comments of Shawn Skillin) (“Mediated settlements often come about after discussion of issues that would be inadmissible and prejudicial in court. For instance, a party may make an admission, or make an apology in order to move toward settlement. An attorney would not advise that in another setting, but in mediation it may be appropriate.”).

49. See, e.g., *Foxgate*, 26 Cal. 4th at 14, *quoting* Note, *Protecting Confidentiality in Mediation*, 98 Harv. L. Rev. 441, 445 (1984) (“Mediation demands ... that the parties feel free to be frank not only with the mediator but also with each other.”)

50. See, e.g., *Foxgate*, 26 Cal. 4th at 14, *quoting* Note, *Protecting Confidentiality in Mediation*, 98 Harv. L. Rev. 441, 445 (1984) (“Agreement may be impossible if the mediator cannot overcome the parties’ wariness about confiding in each other during these sessions.”).

51. See, e.g., CLRC Staff Memorandum 2015-46, Exhibit p. 205 (comments of Daniel Yamshon) (“Confidentiality allows experienced counsel to give sound advice that clients may not want to hear.”).

52. An attorney cannot rely on the attorney-client privilege, because the attorney is not a holder of that privilege. See Evid. Code §§ 953, 954.

53. See, e.g., CLRC Staff Memorandum 2015-46, Exhibit p. 205 (comments of Daniel Yamshon) (“I can imagine a disputant, a few days after settlement, getting sage advice from their next-door neighbor, great uncle or astrologer about how they settled too low, immediately creating buyer’s remorse and immediately seeking representation to sue the original lawyer for misconduct, malpractice or worse. The public reads headlines; not every slip and fall is a multi-million dollar case.”); CLRC Staff Memorandum 2015-46, Exhibit p. 58 (comments of Paul Glusman) (“[W]ith the prospect of any dissatisfied litigant suing a lawyer for malpractice over what happened in mediation, it’s going to be very hard to get any lawyers to bring cases to mediators if they can no longer be candid.”); CLRC Staff Memorandum 2015-45, Exhibit p. 26 (comments of Shawn Skillin) (Attorneys “should be able to represent their clients in mediation and assist them in exploring strategies that can lead to settlement without being concerned that advice appropriate under mediation conditions, can later be used against them in a malpractice action.”).

As the Court stated in *Cassel*,

the Legislature might reasonably believe that protecting [private attorney-client conversations] facilitates the use of mediation as a means of dispute resolution by allowing frank discussions between a mediation disputant and the disputant’s counsel about the strengths and weaknesses of the case, the progress of negotiations, and the terms of a fair settlement, without concern that the things said by either the client or the lawyers will become the subjects of later litigation against either.

1 Mediation confidentiality might also embolden an attorney to disclose a  
2 sensitive personal matter in a mediation, in hopes of helping achieve a favorable  
3 settlement for the client. For example, an attorney might tell the mediator about a  
4 stupid mistake the attorney once made, to help persuade the mediator that the  
5 mediation opponent might have made a similar stupid mistake in the dispute at  
6 hand. Absent mediation confidentiality, the attorney might prefer to keep quiet  
7 about this embarrassing personal experience.

8 Similar considerations might apply to a mediator, an expert attending the  
9 mediation (e.g., a tax accountant or a doctor), or a party's spouse or other  
10 mediation participant. A mediator with many years of experience put it this way:

11 There is a magic involved in how mediated disputes resolve — and the  
12 resolutions can only occur when the participants believe their discussions are  
13 confidential and positions will be handled with respect and thoughtfulness .... It is  
14 extremely important to the process that participants understand that when they  
15 make suggestions and proposals that their ideas will not come back to bite them  
16 ....<sup>54</sup>

17 ***Successful Mediation Encourages Future Use of Mediation to Resolve Disputes***

18 Another premise underlying mediation confidentiality is that successful  
19 mediation of a dispute will promote future use of mediation to resolve other  
20 disputes. This premise is often left unstated, but it is an implicit assumption of the  
21 many rules and statutes protecting mediation communications.

22 The idea is that whether disputants choose to mediate is tied to what they know  
23 about mediation success rates. If disputants view mediation as a costly, useless  
24 procedure, few disputants will want to mediate;<sup>55</sup> if disputants view mediation as  
25 an effective means of achieving a satisfactory settlement, many disputants will  
26 choose to mediate. Perceptions of the effectiveness of mediation (or lack thereof)  
27 presumably correlate with actual success rates, and thus with the volume of future  
28 mediations.

29 ***The Use of Mediation To Resolve Disputes Is Beneficial to Society***

30 The final premise underlying mediation confidentiality is a widespread belief  
31 that encouraging mediation is beneficial to the public.<sup>56</sup> In establishing a mediation  
32 pilot project, the Legislature succinctly explained this point:

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51 Cal. 4th at 136.

54. CLRC Staff Memorandum 2015-46, Exhibit p. 80 (comments of Vivian Holly); see also *id.* at Exhibit p. 145 (comments of Larry Rosen).

55. See generally CLRC Staff Memorandum 2015-46, Exhibit pp. 80 (comments of Vivian Holly) (“Losing confidentiality protections will turn into the death knell for mediation.”), 182 (comments of Monika Tippie) (“[E]liminating confidentiality will mean that the number of people who choose mediation will plummet.”).

56. See, e.g., Code Civ. Proc. § 1775(c) (“It is in the public interest for mediation to be encouraged and used where appropriate by the courts.”).

In the case of many disputes, litigation culminating in a trial is costly, time consuming and stressful for the parties involved. Many disputes can be resolved in a fair and equitable manner through less formal processes.

... Alternative processes for reducing the cost, time, and stress of dispute resolution, such as mediation, have been effectively used in California and elsewhere. In appropriate cases mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system.<sup>57</sup>

Mediation is thus thought to have multiple benefits:

- *Self-determination.* Mediation is consistent with democratic ideals of self-determination, because disputants directly participate in the process and strive to reach a mutually acceptable agreement.<sup>58</sup> Although a court can compel disputants to mediate,<sup>59</sup> any settlement must be voluntary.<sup>60</sup>
- *Party satisfaction.* Because parties participate in mediation and have control over the result, they tend to be well-satisfied with the process.<sup>61</sup> The resolution is amicable, so mediation may be less stressful than litigation, further enhancing party satisfaction.<sup>62</sup> This stress reduction effect may be especially important in family disputes, particularly ones involving children.<sup>63</sup> Mediation also allows for creativity that may result in a win-win

57. Code Civ. Proc. § 1775(b), (c); see also *Wimsatt*, 152 Cal. App. 4th at 150.

58. See Evid. Code § 1115(a).

59. See, e.g., Code Civ. Proc. §§ 1775-1775.15.

60. See Evid. Code § 1115(a); Cal. R. Ct. 3.853; see generally *Gaines v. Fidelity Nat'l Title Ins. Co.*, 62 Cal. 4th 1081, 1103, 365 P.3d 904, 199 Cal. Rptr. 3d 137 (2016); *Jeld-Wen, Inc. v. Superior Court*, 146 Cal. App. 4th 536, 540-41, 53 Cal. Rptr. 3d 115 (2007); 6 B. Witkin, Cal. Procedure *Proceedings Without Trial* § 486, p. 942 (5th ed. 2008).

61. UMA, *supra* note 5, at Prefatory Note.

62. See, e.g., CLRC Staff Memorandum 2015-45, Exhibit p. 16 (comments of Bruce Edwards, past Chairman of the Board of JAMS) (“We can all agree that we live in a world with increasing stressors and conflict .... We desperately need any and all processes that encourage dialogue, find compromise and ultimately resolve conflict.”); CLRC Staff Memorandum 2015-46, Exhibit p. 84 (comments of Betsy Johnson) (mediation “de-escalates conflict”).

63. See, e.g., CLRC Staff Memorandum 2015-54, Exhibit p. 3 (comments of Collaborative Practice California) (“Family law matters hold a special place in jurisprudence in that traditional adversarial litigation is clearly harmful to families and children.”); First Supplement to CLRC Staff Memorandum 2015-54, Exhibit p. 17 ( comments of Hon Isabel Cohen (ret.)) (“The advantages of even a bad settlement ... are ... most importantly, to the emotional lives of children, which most recent studies now show are wrecked by the conflict between their parents, and not by the shared parenting plans.”); First Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 7 (comments of Hon. Susan Finlay (ret.)) (“Mediation has been particularly helpful to divorcing parents since it enables them to preserve their co-parent relationship which benefits the children. If they do not have this option, then they are forced to litigate which destroys families, seriously damaging the children in the process.”).



1 solution for the disputants, in which both sides are able to attain their key  
2 objectives and thus are likely to be satisfied.<sup>64</sup>

- 3 • *Cost reduction.* A successful mediation allows disputants to avoid  
4 prohibitive litigation expenses.<sup>65</sup> As the Legislature has noted, mediation  
5 “can have the greatest benefit for the parties in a civil action when used  
6 early, before substantial discovery and other litigation costs have been  
7 incurred.”<sup>66</sup> Cost savings attributable to mediation may further contribute to  
8 party satisfaction.
- 9 • *Delay reduction.* Through mediation, parties may be able to resolve a  
10 dispute more quickly than through the litigation process.<sup>67</sup> The early  
11 elimination of disputes might not only contribute to party satisfaction, but  
12 might also be beneficial to society generally.
- 13 • *Conservation of judicial resources and alleviation of court congestion.* Each  
14 successful mediation may conserve judicial resources and help to reduce  
15 court congestion. This in turn may allow judges to resolve the remaining  
16 cases more promptly and with a greater degree of care, thus promoting  
17 equitable results.<sup>68</sup>

18 Attaining these societal benefits is the ultimate goal of, and justification for,  
19 provisions that protect mediation confidentiality.

## 20 **Special Considerations Relating to Mediator Testimony**

21 One final point is worth noting before turning to the countervailing policy  
22 interests in this study. Specifically, mediator testimony and mediator  
23 communications trigger special considerations with respect to mediation  
24 confidentiality, because it is critical for a mediator to be perceived as impartial.<sup>69</sup>

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64. R. Fisher & W. Ury, *Getting to Yes* 56-80 (2d ed. 1991).

65. See, e.g., Third Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 5 (comments of Amy Newman, on behalf of Alternative Dispute Resolution Centers) (Mediation “clearly mitigates the costs of protracted litigation.”).

66. Code Civ. Proc. § 1775(d).

67. See, e.g., Code Civ. Proc. § 1775(b), (c).

68. See, e.g., CLRC Staff Memorandum 2015-46, Exhibit pp. 1 (comments of Ron Kelly) (“Our budget-starved courts rely on confidential mediation to resolve a large part of their pending civil cases.”), 141 (comments of Hon. Diane Ritchie (ret.)) (“Mediation drastically reduces the number of cases that go to trial. If part of the ... confidentiality for mediation is removed, this will not be possible.... The courts cannot take on the burden of a massive increase in the number of trials without increasing the time a case gets to trial by many years.”); Second Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 5 (comments of Daniel J. Kelly) (“The actual effect of [mediation] confidentiality is that it has served us well in the mediation process and, indeed, is the linchpin in bringing disputes to resolution prior to going to Court. Doing away with confidentiality in mediation will result in fewer resolutions and will ultimately mean hanging one more albatross around the neck of an already strained and grossly underfunded judicial apparatus.”).

69. See, e.g., Third Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 7 (comments of Loretta Van Der Pol and J. Felix De La Torre, on behalf of Public Employment Relations Board (hereafter, “PERB”) (“While confidentiality serves the important role of fostering candid dialogue between the parties

1 The concern is that no one will want to use a mediator who appears to be biased  
2 against them, yet it might be impossible for a mediator to maintain a reputation for  
3 impartiality if the mediator is forced to testify against a party, or the mediator's  
4 statements are used at a trial.<sup>70</sup> This effect may be particularly pronounced where  
5 the same attorneys and parties repeatedly use a particular mediation service to  
6 resolve disputes of a certain type.<sup>71</sup>

7 A further concern is that the potential burdens of having to testify or provide  
8 evidence about a mediation may deter some mediators from continuing to serve as  
9 such. This is perhaps most likely to occur when mediators serve on a pro bono or  
10 poorly-compensated basis, as in some court-connected or community-based  
11 programs.<sup>72</sup>

12 The problem could also arise in other settings, however. As a federal court put  
13 it, forcing mediators to “give evidence that hurts someone from whom they  
14 actively solicited trust ... rips the fabric of their work and can threaten their sense  
15 of the center of their professional integrity.”<sup>73</sup>

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and the mediator, it is also a critical element for maintaining a mediator's impartiality. Were SMCS to lose the promise of absolute confidentiality, it risks losing its neutrality in the eyes of our constituents.”); Second Supplement to CLRC Staff Memorandum 2014-60 (comments of Hon. Paul Aiello (ret.)) (“[A]ny possibility that a mediator might be called to testify in subsequent proceedings affects and diminishes the vital appearance of impartiality that must be preserved if the integrity of the ADR processes is not to be compromised.”).

70. See, e.g., *In re Anonymous*, 283 F.3d 627, 639 (4th Cir. 2001) (“[G]ranting of consent for the mediator to participate in any manner in a subsequent proceeding would encourage perceptions of bias in future mediation sessions involving comparable parties and issues ....”); *N.L.R.B. v. Macaluso*, 618 F.2d 51, 55 (9th Cir. 1980), *quoting* *Tomlinson of High Point, Inc.*, 74 N.L.R.B. 681, 688 (1947) (“[C]onciliators must maintain a reputation for impartiality.... If conciliators were permitted or required to testify about their activities, or if the production of notes or reports of their activities could be required, not even the strictest adherence to purely factual matters would prevent the evidence from favoring or seeming to favor one side or the other.”); (Third Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 8 (comments of Loretta Van Der Pol and J. Felix De La Torre, on behalf of PERB), *quoting* Ellen Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 Marquette L. Rev. 79, 82 (2001) (“A mediator who testifies will inevitably be seen as acting contrary to the interests of one of the parties, which necessarily destroys her neutrality.”).

71. See Third Supplement to CLRC Staff Memorandum 2015-46, Exhibit p. 9 (comments of Loretta Van Der Pol and J. Felix De La Torre, on behalf of PERB) (“In the context of PERB's mediations, the damage to a mediator's neutrality is exacerbated because our mediators routinely work with many of the same labor attorneys and/or representatives for labor and management.”).

72. See, e.g., *Olam*, 68 F. Supp. 2d at 1133 (“[O]rdering mediators to participate in proceedings arising out of mediations imposes economic and psychic burdens that could make some people reluctant to agree to serve as a mediator, especially in programs where that service is pro bono or poorly compensated.”); CLRC Staff Memorandum 2016-58, Exhibit p. 13 (comments of Mary B. Culbert, on behalf of Loyola Law School Center for Conflict Resolution) (“[S]ubjecting mediators to subpoena disrupts the delivery of services and is particularly detrimental to community mediation programs because of their shoe-string budgets and reliance on volunteer mediators.... [T]he costly, time-consuming, and anxiety-provoking activity of fighting off subpoenas, for organizations with limited funding, could significantly impact the availability of volunteers to staff these community mediation programs.”).

73. *Olam*, 68 F. Supp. 2d at 1133.

1 In many jurisdictions, concerns like the ones described above have led to special  
2 rules governing mediator testimony and mediator communications.<sup>74</sup> California is  
3 among these.<sup>75</sup>

4 **Key Reasons For Permitting Disclosure of Mediation Communications To Establish**  
5 **Attorney Misconduct**

6 The policy analysis for permitting disclosure of mediation communications  
7 bearing on attorney misconduct has several key components:

- 8 • Mediation confidentiality may deprive a party of evidence that would help  
9 prove that an attorney committed malpractice or engaged in other  
10 misconduct.
- 11 • Because mediation confidentiality may result in exclusion of relevant  
12 evidence, attorney misconduct may go unpunished.
- 13 • Allowing attorney misconduct to go unpunished may chill future use of  
14 mediation and deprive the public of its benefits.
- 15 • Allowing attorney misconduct to go unpunished may undermine attorney-  
16 client relations and the administration of justice.

17 Each point is discussed in order below.

18 ***Exclusion of Evidence of Attorney Misconduct***

19 By accepting employment to provide legal advice or other legal services, an  
20 attorney “impliedly agrees to use such skill, prudence, and diligence as lawyers of  
21 ordinary skill and capacity commonly possess and exercise in the performance of  
22 the tasks which they undertake.”<sup>76</sup> The attorney-client relationship is a fiduciary  
23 relationship “of the very highest character,” in which the attorney must serve the  
24 client with the “most conscientious fidelity.”<sup>77</sup> An attorney is also “an officer of  
25 the court and is bound to work for the advancement of justice.”<sup>78</sup>

26 In representing a client at a mediation, an attorney might not always comply  
27 with those professional duties.<sup>79</sup> Sometimes an attorney may make a significant  
28 mistake in the course of a mediation, one stemming from failure to exercise due  
29 care on a client’s behalf.<sup>80</sup> For example, an attorney might give a client erroneous

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74. See discussion of “Law of Other Jurisdictions” *infra*.

75. See Evid. Code §§ 703.5, 1121.

76. Lucas v. Hamm, 56 Cal. 2d 583, 591, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

77. Cox v. Delmas, 99 Cal. 104, 123, 33 P. 836 (1892).

78. Hickman v. Taylor, 329 U.S. 495, 511 (1947).

79. See, e.g., CLRC Staff Memorandum 2015-36, Exhibit pp. 1-2 (comments of Gwire Law Firm) (estimating that about 50-150 potential clients contact law firm each year “about attorney conduct issues or communications that occurred during a mediation”).

80. See, e.g., Horner v. Carter, 981 N.E.2d 1210 (Ind. S.Ct. 2013) (husband sought to use mediation communications to prove mistake in drafting of mediated settlement agreement, but mediation

1 advice on the tax implications of a particular settlement approach,<sup>81</sup> or might  
2 inadvertently disclose a trade secret or damaging evidence. An attorney might also  
3 fail to exercise due care in recommending that a client accept a settlement offer  
4 made during a mediation, causing the client to settle a dispute for less than it is  
5 worth, or on unduly unfavorable terms.<sup>82</sup>

6 An unscrupulous attorney might even be dishonest in a mediation, to a client's  
7 detriment.<sup>83</sup> For example, an attorney might promise to reduce a client's fee to  
8 convince the client to settle a case, and then later renege on that promise.<sup>84</sup>

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confidentiality requirement barred use of such evidence); *Wimsatt*, 152 Cal. App. 4th at 142-44 (mediation party sought to use mediation brief to prove attorney made unauthorized settlement demand and thus impaired party's ability to obtain satisfactory settlement, but mediation confidentiality requirement barred use of that brief); *Gossett v. St. John*, 2011 Cal. App. Unpub. LEXIS 3586, at \*12 (2011) (client alleged that his attorneys failed to inform him that he would be personally liable under mediated settlement agreement).

81. See, e.g., *Porter*, 107 Cal. Rptr. 3d at 955 (depublished opinion) (after mediation, dispute arose between attorney and clients over attorney's "alleged rendering of incorrect tax advice to the [clients] regarding settlement proceeds"); CLRC Staff Memorandum 2015-36, Exhibit p. 5 (comments of Gwire Law Firm) (potential client sought to bring malpractice suit alleging that in mediation "[l]awyer claimed, without having any valid basis for doing so, that settlement proceeds would be nontaxable").

82. See, e.g., *Amis v. Greenberg Traurig LLP*, 235 Cal. App. 4th 331, 185 Cal. Rptr. 3d 322 (2015) (client contended that his former attorney failed to adequately advise him of risks of mediated settlement agreement); *Cassel*, 51 Cal. 4th at 118 (plaintiff alleged that "by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth.").

83. See, e.g., *Hadley v. The Cochran Firm*, 2012 Cal. App. Unpub. LEXIS 5743 (2012) (plaintiffs claimed that their former attorneys had "tricked them into settling their claims against [a third party] by inducing them to sign a supposed confidentiality agreement at a mediation, and later appending the signature sheet to a settlement agreement.").

In citing to *Hadley* and other unpublished or depublished decisions in this tentative recommendation, the Commission does not mean to imply that those decisions have any precedential value. Rather, the Commission is merely citing them for illustrative purposes in assessing the optimal legislative approach.

84. See, e.g., *In re Bolanos*, Case No. 12-O-12167 (Review Dep't of State Bar Ct., filed May 18, 2015), pp. 4-5 (available at <http://www.statebarcourt.ca.gov/Portals/2/documents/opinions/Bolanos.pdf>). In this unpublished opinion, the Review Department of the State Bar Court says:

[The attorney/defendant] admits he agreed to modify his fee agreement at the mediation so that [the client/plaintiff] would receive \$250,000, rather than a percentage, from the settlement....

The hearing judge found that, after the mediation, [the attorney/defendant] "came to the conclusion that the modification was invalid because there was no consideration for the alteration of the ... fee agreement."

*Id.*

See also *Porter*, 107 Cal. Rptr. 3d at 655 (depublished opinion) ("The instant lawsuit arose as a result of [an attorney's] failure to follow through on a promise that was allegedly made to the [clients] during a mediation ... wherein [the attorney] promised to pay the [clients] certain proceeds from their attorney fees."); CLRC Memorandum 2013-47, pp. 10-13 & Exhibit pp. 3-4 (comments of Sidney Tinberg); Second Supplement to CLRC Memorandum 2013-47, pp. 8-9 (comments of Jerome Sapiro).

By properly memorializing an attorney's promise to reduce a fee, made in the course of a mediation, a client could guard against having the attorney renege on the promise, at least in California. The mediation confidentiality statutes would not prevent proof of the attorney's promise, so long as it is properly

1 Alternatively, an attorney might threaten a client in a mediation or otherwise  
2 attempt to coerce a client to settle,<sup>85</sup> as by threatening to abandon the client on the  
3 eve of trial,<sup>86</sup> hounding a client's every move and unduly pressuring the client,<sup>87</sup> or  
4 threatening to expose embarrassing or otherwise harmful information about a  
5 client.<sup>88</sup>

6 In the mediation process, an attorney might also say something that reveals or  
7 otherwise tends to suggest that the attorney engaged in prior misconduct.<sup>89</sup> For  
8 example, an attorney might admit to having lost a critical piece of evidence that  
9 the client entrusted to the attorney.

10 In each of these situations, a strict mediation confidentiality requirement might  
11 preclude a client from introducing evidence of the attorney's culpable or  
12 incriminating mediation communications in a later proceeding against the  
13 attorney. In other words, such a requirement might deprive a victimized client of  
14 valuable evidence of an attorney's wrongdoing.<sup>90</sup>

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memorialized in accordance with Evidence Code Section 1123 or 1124. An unsophisticated client may not know enough to take this step.

85. *Provost v. Regents*, 201 Cal. App. 4th 1299, 1302, 135 Cal. Rptr. 3d 591 (2011) (party claimed that mediated settlement agreement was unenforceable because his attorney, opposing counsel, and mediator coerced him into signing it through threats of criminal prosecution).

86. See, e.g., *Chan v. Lund*, 188 Cal. App. 4th 1159, 1164, 116 Cal. Rptr. 3d 122 (2011) (attorney "allegedly threatened on the eve of trial to withdraw from the case if [client] refused to participate in a further session with [the mediator] or if [client] refused to make concessions to settle the matter."); *Cassel*, 51 Cal. 4th at 120 (to convince client to accept offer made in mediation, attorneys allegedly "threatened to abandon [client] at the imminently pending trial").

87. See, e.g., *Cassel*, 51 Cal. 4th at 120 (Attorneys "even insisted on accompanying [client] to the bathroom, where they continued to 'hammer' him to settle. Finally, at midnight, after 14 hours of mediation, when he was exhausted and unable to think clearly, attorneys presented a written draft settlement agreement and evaded his questions about its complicated terms. Seeing no way to find new counsel before trial, and believing he had no other choice, he signed the agreement.").

Some clients may be able to protect themselves from such misconduct by walking out of the mediation. Other clients might be too intimidated to leave, or might not be sophisticated enough to realize that they are entitled to do so.

88. See, e.g., *Rabe v. Dillard's, Inc.*, 214 S.W.3d 767 (Tex. Ct. App. 2006) (mediation party claimed that during mediation, opposing counsel threatened to contact worker's compensation carrier to advise that party had prior injury and was "doctor-shopping" for narcotics).

89. See, e.g., Fla. Mediator Ethics Advisory Committee Opin. No. 2006-005, *available at* <http://www.flcourts.org/core/fileparse.php/283/urlt/MEACOpinion2006-005.pdf> (in course of mediation, attorney told mediator that attorney misspent funds held in escrow).

90. See, e.g., *Cassel*, 51 Cal. 4th at 136 (mediation confidentiality requirement may "result in the unavailability of valuable civil evidence"); see also *id.* at 135.

1 ***Loss of Evidence May Mean Culpable Conduct Goes Unpunished or Another Inequitable***  
2 ***Result Occurs***

3 In general, our justice system seeks truth by permitting parties to present all  
4 relevant evidence to the trier-of-fact.<sup>91</sup> Because mediation confidentiality can lead  
5 to exclusion of relevant evidence, in some instances it might mean that attorney  
6 misconduct goes unpunished or another inequitable result occurs.<sup>92</sup> Excluded  
7 evidence may be critical to proving alleged misconduct, yet the bar against using it  
8 may shield an attorney from liability.<sup>93</sup> It is also possible that excluded mediation  
9 evidence may be critical to *disproving* alleged misconduct, yet the bar against  
10 using it could prevent such exoneration.<sup>94</sup>

11 Inequitable results like these would not necessarily occur every time a mediation  
12 confidentiality requirement precludes a client from introducing evidence against  
13 an attorney, or vice versa. In some cases, the proponent of such evidence may not  
14 have a valid claim or defense; not every allegation of attorney misconduct is true

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91. See, e.g., Evid. Code § 351; *Steiny & Co. v. California Electric Supply Co., Inc.*, 79 Cal. App. 4th 285, 291, 93 Cal. Rptr. 2d 920 (2000).

92. See, e.g., *Olam*, 68 F. Supp. 2d at 1137 (“[R]efusing to compel the mediator to testify might well deprive the court of the evidence it needs to rule reliably on the plaintiff’s contentions — and thus might either cause the court to impose an unjust outcome on the plaintiff or disable the court from enforcing the settlement.”).

If an attorney misbehaves at a mediation, even a strict mediation confidentiality requirement would not prevent the client from telling others that the attorney did not do a good job for the client and discouraging them from hiring the attorney. Likewise, the attorney could deny as much.

A strict mediation confidentiality requirement would, however, prevent both sides from using mediation communications to support and explain their positions. Without either side being able to provide some specificity, it may be difficult for market forces to properly respond to the situation. The impact on the attorney might not correlate with the attorney’s degree of culpability, if any.

93. See, e.g., *Cassel*, 51 Cal. 4th at 119 (mediation confidentiality “may compromise [a client’s] ability to prove his claim of legal malpractice.”); *id.* at 138 (Chin, J., concurring) (mediation confidentiality “will effectively shield an attorney’s actions during mediation ... from a malpractice action even if those actions are incompetent or even deceptive.”); *Wimsatt*, 152 Cal. App. 4th at 162 (“Preventing Kausch from accessing mediation-related communications may mean he must forgo his legal malpractice lawsuit against his own attorneys.”); *Kausch v. Wimsatt*, 2009 Cal. App. Unpub. LEXIS 8566, at \*2 (“[A]n attorney is immunized from any negligent and intentional torts committed in mediation when said torts are the result of communications made for the purpose of, in the course of, or pursuant to a mediation, or a mediation consultation. The bottom line is that Kausch is foreclosed from litigating his allegation that Magaña lowered Kausch’s settlement demand without authorization, resulting in a settlement far below the reasonable value of his personal injury lawsuit.”).

94. See, e.g., *Grubaugh v. Blomo*, 238 Ariz. 264, 359 P.3d 1008 (Ariz. Ct. App. 2015) (attorney sought to use mediation communications in defending against legal malpractice claim); *In re Teligent*, 640 F.3d 53 (2d Cir. 2011) (involving unsuccessful attempt by law firm accused of malpractice to obtain discovery of information from mediation it did not attend, which it claimed was critical to issues in malpractice case); First Supplement to CLRC Staff Memorandum 2013-47, pp. 8-9 (comments of Jeffrey W. Erdman) (explaining that “existing law, particularly as applied in *Cassel*, creates a hornet’s nest for attorneys seeking to defend against professional negligence claims related to their conduct at mediation.”).

1 or a valid basis for recovery.<sup>95</sup> In other cases, the proponent may be able to  
2 successfully establish a claim or defense without using the excluded mediation  
3 evidence.<sup>96</sup>

4 The most problematic situation appears to be misconduct that allegedly occurs  
5 *in a mediation context*. In that situation, much if not all of the relevant evidence  
6 for both sides may fall within the scope of a mediation confidentiality requirement  
7 and thus be unavailable in resolving whether misconduct actually occurred.<sup>97</sup> As a  
8 result, a client may be left without a remedy for a meritorious legal malpractice  
9 claim, an unscrupulous or incompetent attorney may remain in practice without  
10 remedial measures to protect the public, or an attorney may be deprived of a valid  
11 defense to a malpractice claim or disciplinary proceeding. In contrast, if  
12 misconduct allegedly occurs before a mediation or in a non-mediation context,  
13 there appears to be a greater likelihood of properly resolving the allegation without  
14 using mediation evidence.

15 ***Allowing Attorney Misconduct to Go Unpunished May Chill Future Use of Mediation and***  
16 ***Deprive the Public of Its Benefits***

17 In addition to leaving a client without a remedy or allowing an unscrupulous or  
18 incompetent attorney to remain in practice without remedial measures to protect  
19 the public, a failure to provide accountability for attorney misconduct in a  
20 mediation context could have other harmful effects. If potential mediation parties  
21 learn that culpable conduct in mediation could go unpunished due to a mediation

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95. See, e.g., *FDIC v. White*, 76 F. Supp. 2d 736 (N.D. Tex. 1999) (defendants claimed that opposing counsel and mediator threatened criminal prosecution to coerce settlement, but court rejected that claim after considering mediation communications.); *Olam v. Congress Mortgage Co.*, 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (After considering mediation communications, court concluded that there was “absolutely no basis” for finding that any action by plaintiff’s counsel overbore plaintiff’s will at mediation); *Porter*, 107 Cal. Rptr. 3d at 658 n.7 (depublished opinion) (trial court sustained demurrer to legal malpractice claim because clients “admitted they suffered no injury from [attorney’s] allegedly incorrect tax advice” provided during mediation); *Conwell v. Mallen*, 2015 Cal. Super. LEXIS 11140 (No. CIV 488713), Aug. 18, 2015) (after considering mediation communications, court rejects legal malpractice claim, which alleged that attorneys engaged in mediation misconduct); First Supplement to CLRC Memorandum 2015-46, Exhibit p. 51 (comments of Gerald Klein) (mediation confidentiality could preclude attorney from introducing “evidence to demonstrate what really happened during the settlement process”).

96. See, e.g., *Benesch v. Green*, 2009 U.S. Dist. LEXIS 117641, at \*25 (2009) (denying summary judgment on legal malpractice claim because plaintiff had not yet had an opportunity to explore “the question of what evidence would be left after application of the mediation confidentiality statutes”); *In re Malcolm*, 2004 Cal. App. Unpub. LEXIS 10675, at \*12 (2011) (husband “made no showing” that exclusion of mediation communications prejudiced his substantive rights to pursue malpractice action against his former attorneys, so husband was still “free to prosecute his malpractice action ... using the property settlement and other nonconfidential evidence.”); CLRC Staff Memorandum 2013-47, pp. 2-9 & Exhibit p. 2 (comments of Elizabeth Moreno & CLRC staff analysis thereof).

97. See, e.g., *Fehr v. Kennedy*, 2010 U.S. App. LEXIS 16953, at \*4 (9th Cir. 2010) (“Without admitting confidential mediation communications, the record is devoid of any evidence of legal malpractice.”).

confidentiality requirement, they might become reluctant to use the mediation process. As one mediator puts it,

protecting malpractice will not instill confidence in the mediation process. There is a greater probability that fewer people will want to mediate, when they learn malpractice is protected.<sup>98</sup>

Assuming that such a chilling effect occurs to some degree, it would tend to deprive the public of the benefits of mediation previously discussed. In other words, if the effect were sufficiently significant, it would undermine the very purpose of the mediation confidentiality requirement.

***Letting Culpable Conduct Go Unpunished or Other Inequitable Results Occur Undermines the Effective Administration of Justice***

Letting attorney misconduct go unpunished due to mediation confidentiality can also have other ramifications. In particular, the state has an interest in enforcing the professional responsibility requirements for attorneys, because it needs to safeguard the integrity of the judiciary and protect the public from incompetent and dishonest attorneys.<sup>99</sup> Honesty is “absolutely fundamental in the practice of law”<sup>100</sup> and an attorney’s good moral character is essential for the protection of clients and for the proper functioning of the judicial system itself.”<sup>101</sup>

Whenever the judicial system fails to render justice in a case, that will tend to shake the public’s faith in the system, and thus a fundamental underpinning of our form of government.<sup>102</sup> The more often such a result occurs, and the more harsh

98. CLRC Staff Memorandum 2014-6, Exhibit p. 15 (comments of Nancy Yeend); see also *Porter*, 107 Cal. Rptr. 3d at 662 (depublished opinion) (“[E]xpanding the mediation privilege to also cover communications between a lawyer and his client would ... create a chilling effect on the use of mediation.”); First Supplement to CLRC Memorandum 2014-60, Exhibit p. 1 (comments of Edward Mason) (disclosing that he has “serious reservations about ever utilizing the mediation process as currently constructed” because he would not be protected from malpractice and could be “left holding the ‘empty bag.’”); CLRC Staff Memorandum 2014-36, Exhibit p. 6 (comments of Karen Mak) (explaining that if she had been aware of possibility of not being able to introduce evidence of mediation misconduct, “there is *no conceivable way* [she] would have considered participating in mediation”) (emphasis in original); First Supplement to CLRC Staff Memorandum 2013-47, Exhibit p. 5 (comments of Bill Chan) (stating that he “will never again use mediation so long as it is a ‘get out of jail free’ card for attorneys that commit malpractice”).

99. *Wimsatt*, 152 Cal. App. 4th at 153, quoting *Foxgate*, 26 Cal. 4th at 17 n.13.

100. *In re Glass*, 58 Cal. 4th 500, 524, 316 P.3d 1199, 167 Cal. Rptr. 3d 87 (2014).

101. *Id.* at 520.

102. See, e.g., *Olam*, 68 F. Supp. 2d at 1136 (“Confidence in our system of justice as a whole, in our government as a whole, turns in no small measure on confidence in the courts’ ability to do justice in individual cases. So doing justice in individual cases is an interest of considerable magnitude.”); Sarah Brand, *Caution to Clients: California’s Mediation Confidentiality Statutes Protect Attorneys From Legal Malpractice Claims Arising Out of Mediation*, 37 T. Jefferson L. Rev. 369, 372 (2015) (inequitable result under mediation confidentiality statute “runs afoul of ensuring the administration of justice”).



1 and obvious the injustice, the greater the damage to public confidence in the  
2 judicial system.

3 When the unjust result favors an attorney, who is considered an officer of the  
4 court,<sup>103</sup> the impact may be especially damaging. The California Supreme Court  
5 has constitutional authority over the practice of law in this state.<sup>104</sup> Consequently,  
6 a failure to control attorney misconduct may reflect particularly badly on the Court  
7 and the entire judicial system. In this way, a strict mediation confidentiality  
8 requirement could have a severe negative impact on the administration of  
9 justice.<sup>105</sup>

10 Damage to public confidence can occur not only when there is actual injustice,  
11 but also when there is an appearance of injustice or even a possibility of it.<sup>106</sup> For  
12 instance, if a mediation confidentiality requirement prevents a client from using  
13 mediation communications to show attorney misconduct, the public is left  
14 wondering what would have happened otherwise. It is unclear whether actual  
15 attorney wrongdoing occurred, but nevertheless there is likely to be some degree  
16 of negative impact on the administration of justice.

#### 17 **Clash of Key Policies**

18 This study thus involves a direct clash between two strong policies: (1) attaining  
19 the societal benefits of mediation confidentiality and (2) furthering public  
20 confidence in the justice system and the pursuit of justice for all.<sup>107</sup> As a result, the

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103. See *Hickman*, 366 U.S. at 511.

104. *In re Garcia*, 58 Cal. 4th 440, 452, 315 P.3d 117, 165 Cal. Rptr. 3d 855 (2014).

105. See, e.g., *Wimsatt*, 152 Cal. App. 4th at 162 (California's mediation confidentiality requirement means that when clients participate in mediation "they are, in effect, relinquishing all claims for new and independent torts arising from mediation .... We believe that the purpose of mediation is not enhanced by such a result because wrongs will go unpunished and the administration of justice is not served."); see also Jonnette Hamilton, *Protecting Confidentiality in Mandatory Mediation: Lessons From Ontario and Saskatchewan*, 24 Queen's L.J. 561, 634 (1999) ("There are some circumstances where the public interest in the proper administration of justice outweighs the interests in maintaining mediation confidentiality.").

106. See, e.g., *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice"); *Rex v. Sussex Justices*, 1 K.B. 256, 259 (1924) ("... a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.") (per Lord Hewart).

107. The problem of excluding evidence that might be needed to ensure justice is not unique to mediation confidentiality requirements. The same problem also arises, for example, with regard to the various evidentiary privileges recognized in the Evidence Code (Evid. Code §§ 930-1063). Each evidentiary privilege is based on a legislative determination that the societal benefits of excluding a particular type of evidence outweigh the potential for injustice stemming from exclusion of that evidence. See, e.g., Third Supplement to CLRC Staff Memorandum 2013-47, Exhibit p. 2 (comments of Paul Glusman). This type of legislative determination may be hard to accept when faced with a specific injustice occurring as a cost of the evidentiary rule.

Unsurprisingly, such rules have always been controversial. Historically, that is why the Federal Rules of Evidence do not include any privileges. See Sen. Rep. No. 93-12377, 93rd Cong. 2d Session (Oct. 18, 1974) (Note on Privilege).

1 area is unusually divisive and attaining a satisfactory compromise is  
2 challenging.<sup>108</sup>

3 A number of other policy considerations are also important in assessing the  
4 merits of various approaches to the topic at hand. Those policy considerations are  
5 described at appropriate points in the remainder of this tentative recommendation.

### California Law on Mediation Confidentiality

6 California has a well-developed statutory scheme for protection of mediation  
7 communications. The discussion below begins by briefly recounting the history of  
8 such protection in California. The Commission then describes the current statutory  
9 framework and case law interpreting those statutes.

#### 10 History of California's Statutory Scheme

11 California's statutory scheme governing mediation confidentiality developed  
12 gradually, becoming more extensive and detailed as mediation grew in popularity.  
13 The key events are described below.

#### 14 Protection of Settlement Negotiations

15 The California Evidence Code was enacted on Commission recommendation in  
16 1965, a decade before the Federal Rules of Evidence were approved.<sup>109</sup> From its  
17 inception, the Evidence Code has included some provisions (Evidence Code  
18 Sections 1152 and 1154) that restrict the admissibility of evidence of settlement  
19 negotiations.<sup>110</sup>

20 Those provisions remain in place today. They are based on the public policy  
21 favoring settlement of disputes without litigation.<sup>111</sup> They are intended to help  
22 foster "the complete candor between the parties that is most conducive to  
23 settlement."<sup>112</sup>

24 Although Sections 1152 and 1154 are intended to promote settlement by  
25 fostering candid negotiations, they provide only limited assurance that comments a  
26 party makes in such negotiations will not later be turned against the party. The  
27 provisions make evidence of such comments inadmissible to prove or disprove

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108. This is true not only in California, but also elsewhere. See, e.g., CLRC Staff Memorandum 2014-44, pp. 18-23 (describing controversy over UMA in Texas); CLRC Staff Memorandum 2014-43, pp. 4-6 (describing controversy over UMA in Pennsylvania); CLRC Staff Memorandum 2014-35, pp. 30-32 (describing controversy over UMA in Massachusetts), 36-39 (describing controversy over UMA and other mediation confidentiality proposals in New York).

109. 1965 Cal. Stat. ch. 299 (operative Jan. 1, 1967); see also *Recommendation Proposing an Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1 (1965).

110. See Evid. Code §§ 1152, 1154.

111. See Evid. Code § 1152 Comment (1965); see also Evid. Code § 1154 Comment.

112. Evid. Code § 1152 Comment (1965); see also Evid. Code § 1154 Comment.

1 liability, but an opponent can still introduce the evidence for other purposes, such  
2 as to show bias, motive, undue delay, or knowledge.<sup>113</sup>

3 ***The Advent of Special Evidentiary Protection for Mediation***

4 In the early 1980's, mediation was beginning to gain acceptance as a means of  
5 resolving disputes in California. After studying means of making mediation a  
6 more useful alternative to a court or jury trial, the Commission recommended the  
7 enactment of a new evidentiary provision, which would protect oral and written  
8 information disclosed in a mediation from subsequent disclosure in a judicial  
9 proceeding.<sup>114</sup>

10 This proposed new provision would supplement, rather than replace, the existing  
11 provisions protecting settlement negotiations.<sup>115</sup> Unlike those provisions, it would  
12 apply regardless of the proponent's purpose in proffering mediation  
13 communications as evidence in a later case.<sup>116</sup> It would, however, only apply to a  
14 mediation if the participants agreed in advance and in writing that the protection  
15 would apply.<sup>117</sup> Further, the proposed provision could not be used to exclude  
16 evidence offered in a criminal case.<sup>118</sup>

17 The new provision was enacted as the Commission recommended.<sup>119</sup> Like the  
18 provisions protecting settlement negotiations, it was based on the public policy  
19 favoring settlement of disputes without litigation.<sup>120</sup>

20 ***A Comprehensive Scheme to Promote Use of Mediation***

21 In 1993, a bill was enacted to establish a comprehensive scheme for promoting  
22 the use of mediation to resolve civil disputes.<sup>121</sup> That bill was the product of

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113. See, e.g., *White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 889, 710 P.2d 309, 221 Cal. Rptr. 509 (1985); *Campisi v. Superior Court*, 17 Cal. App. 4th 1833, 1838, 22 Cal. Rptr. 2d 335 (1993); *Young v. Keele*, 188 Cal. App. 3d 1090, 1093-94, 233 Cal. Rptr. 850 (1987).

The possibility of offering a piece of evidence for a purpose other than proving liability constitutes a significant limitation on the effectiveness of Sections 1152 and 1154, because opponents can be quite creative in conceiving purposes for introduction of such evidence, and, once admitted, the evidence might influence the determination of liability despite a limiting instruction. See *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations*, 29 Cal. L. Revision Comm'n Reports 345, 353-54, 359-61 (1999) & sources cited therein.

114. See *Recommendation Relating to Protection of Mediation Communications*, 18 Cal. L. Revision Comm'n Reports 241, 245 (1985) (hereafter, "CLRC Mediation Recommendation #1").

115. See *id.* at 245.

116. See *id.* at 246-47.

117. See *id.* at 245-46.

118. See *id.* at 243, 246.

119. See 1985 Cal. Stat. ch. 731, § 1 (former Evid. Code § 1152.5).

120. See former Evid. Code § 1152.5 Comment (reproduced in *Communication From California Law Revision Concerning Assembly Bill 1030*, 18 Cal. L. Revision Comm'n Reports 377, 378 (1985)).

1 negotiations between key stakeholders;<sup>122</sup> the Commission was not involved in the  
2 process.<sup>123</sup>

3 As enacted, the bill made a number of important reforms relating to  
4 mediation.<sup>124</sup> In particular, the bill substantially revised the statutory provision  
5 restricting use of mediation evidence.<sup>125</sup> Among other things, the revisions did the  
6 following:

- 7 • Eliminated the requirement of a written agreement to invoke the statutory  
8 protection for mediation communications and documents.<sup>126</sup>
- 9 • Expressly protected mediation communications and documents from  
10 disclosure in civil discovery, not just from being admitted into evidence.<sup>127</sup>
- 11 • Made mediation communications confidential.<sup>128</sup>

12 The 1993 bill also created a mandatory mediation pilot project, which was based  
13 on legislative findings recognizing the benefits of mediation.<sup>129</sup> In addition, the bill

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121. See SB 401 (Lockyer), 1993 Cal. Stat. ch. 1261; Senate Committee on Judiciary Analysis of SB 401 (May 25, 1993), p. 2.

122. SB 401 was “the product of a series of discussions between the Judicial Council, the State Bar of California, the California Trial Lawyers Association [now known as the Consumer Attorneys of California], the California Judges Association, the California Defense Counsel, the Los Angeles County Bar Association, representatives of the mediation community, and the author’s staff.” Senate Committee on Judiciary Analysis of SB 401 (May 25, 1993), p. 2. All of those groups “agree[d] that mediation can be an effective tool to resolve civil disputes in a fair, timely, and cost-effective manner.” *Id.*

123. The Commission’s role is to make recommendations for revision of California law on topics assigned by the Legislature, not to take positions on legislation crafted by others. See Gov’t Code §§ 8280-8298.

124. The bill also made some reforms relating to arbitration, which are not pertinent to this study.

125. See 1993 Cal. Stat. ch. 1261, § 6.

126. See *id.* Apparently, the requirement of a written agreement was considered onerous, particularly in disputes involving unsophisticated persons.

127. See former Evid. Code § 1152.5(a)(2), 1993 Cal. Stat. ch. 1261, § 6.

128. See former Evid. Code § 1152.5(a)(3), 1993 Cal. Stat. ch. 1261, § 6 (“When persons agree to conduct or participate in mediation for the sole purpose of compromising, settling, or resolving a dispute, in whole or in part, all communications, negotiations, or settlement discussions by and between participants or mediators in the mediation shall remain confidential.”).

The 1993 bill also revised the provision protecting mediation communications (former Evid. Code § 1152.5) to: (1) expressly extend its protection to a mediation that would partially rather than fully resolve a dispute, (2) make clear that a written settlement agreement was “admissible to show fraud, duress, or illegality if relevant to an issue in dispute,” (3) specify that “[e]vidence otherwise admissible or subject to discovery outside of mediation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation,” and (4) add an attorney’s fee provision. See 1993 Cal. Stat. ch. 1261, § 6.

129. See 1993 Cal. Stat. ch. 1261, § 4. The mandatory mediation pilot project operated in Los Angeles County, and in any other county electing to participate. The pilot project was scheduled to sunset on January 1, 1999, but the sunset provision was later repealed and the program continued in Los Angeles until it was discontinued due to budget cuts in 2013. See *id.* (former Code Civ. Proc. § 1775.16); 1998 Cal. Stat. ch. 618, § 1 (repealing former Code Civ. Proc. § 1775.16).

1 revised an evidentiary provision on competency to testify (Evidence Code Section  
2 703.5), making it applicable to a mediator, not just to an arbitrator or person  
3 presiding at a judicial or quasi-judicial proceeding. Under that provision as so  
4 revised, a mediator is generally precluded from testifying about a mediation in any  
5 subsequent civil proceeding.<sup>130</sup>

6 ***No Report by a Mediator to a Court***

7 In 1995, the Legislature enacted a new provision relating to mediation  
8 confidentiality, which prohibited a mediator from reporting to a court regarding a  
9 mediation unless the parties expressly agreed, in writing, to allow such a report  
10 before the mediation began.<sup>131</sup> That provision was intended to prevent a mediator  
11 from coercing a party to settle a case by threatening to tell the judge negative  
12 things about the party's behavior at a mediation (e.g., the party unreasonably  
13 refused to settle or took an untenable position on a particular issue).<sup>132</sup> The  
14 provision thus focused on ensuring that any settlement agreement reached in  
15 mediation was truly voluntary.

16 ***Protection of Mediation Intake Communications***

17 The following year, the provision on admissibility, discoverability, and  
18 confidentiality of mediation communications was amended to expressly apply not  
19 only when parties agree to mediate, but also when a person consults a mediator or  
20 mediation service for the purpose of retaining the mediator or mediation service.<sup>133</sup>

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130. Section 703.5 currently provides:

703.5. No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings under paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this section does not apply to a mediator with regard to any mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

131. See 1995 Cal. Stat. ch. 576, § 8 (former Evid. Code § 1152.6), which read as follows:

1152.6. A mediator may not file, and a court may not consider, any declaration or finding of any kind by the mediator, other than a required statement of agreement or nonagreement, unless all parties in the mediation expressly agree otherwise in writing prior to commencement of the mediation. However, this section shall not apply to mediation under Chapter 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

132. See R. Kelly, *New Law Takes Effect to Protect Mediation Rights*, N. Cal. Mediation Ass'n News. (Spring 1996). There was concern that former Section 1152.5 (1993 Cal. Stat. ch. 1261, § 6) alone would not stop such conduct, because some local rules expressly deemed participation in a mediation program as a waiver of the protections of that section with regard to having the mediator submit an evaluation to the court. See Kelly, *supra*; Contra Costa Sup. Ct., Loc. R. 207 (1996).

133. See 1996 Cal. Stat. ch. 174, § 1.

1 According to the author of the bill, this change was needed to fill a significant gap  
2 in coverage.<sup>134</sup>

### Current Statutory Framework

3 Following a study by this Commission, a bipartisan<sup>135</sup> bill relating to mediation  
4 confidentiality was enacted in 1997,<sup>136</sup> resulting in the current statutory scheme.<sup>137</sup>  
5 The section below describes the structural effect and objectives of that bill. The  
6 next section describes the core substance of existing law. For convenient  
7 reference, the key provisions and corresponding Commission Comments are  
8 reproduced in Appendix A.

### 9 *Structural Effect and Objectives*

10 As recommended by the Commission, the 1997 bill created a new chapter in the  
11 Evidence Code (Sections 1115-1128), entitled “Mediation.” The bill also repealed  
12 the provision on admissibility, discoverability, and confidentiality of mediation  
13 communications<sup>138</sup> and the provision restricting a mediator from reporting to a  
14 court regarding a mediation.<sup>139</sup> Most of the substance of those two provisions was  
15 continued, with some revisions, in the new chapter.<sup>140</sup> Section 703.5 (governing a  
16 mediator’s competency to testify) and Sections 1152 and 1154 (restricting the

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134. See Senate Committee on Judiciary Analysis of SB 1522, p. 3 (May 14, 1996):

In order to gauge a mediator’s qualifications and qualities, it may be necessary to discuss certain aspects of the case in order to assess his or her expertise and sensitivity. From a literal technical sense, those discussions are not part of a mediation proceeding and could be subject to discovery by the opposing party. Left open, the gap could significantly chill the use of mediation services.

135. The bill was authored by Assembly Member Ortiz (a Democrat), and co-authored by Assembly Member Ackerman (a Republican). The bill received extensive support, not a single vote was cast against it during the legislative process, and Governor Wilson signed it into law. *See* 1997 Cal. Stat. ch. 772 (AB 939 (Ortiz)); *see also* Assembly Committee on Judiciary Analysis of AB 939 (April 16, 1997); Senate Committee on Judiciary Analysis of AB 939 (Aug. 26, 1997).

Nonetheless, the proposal was not without controversy. The Commission received considerable input from a variety of sources in the course of its study, and refined its ideas throughout the process in response to suggestions received. Further revisions were made once the bill was introduced, to address concerns raised. In all, the bill was amended five times before it was enacted; the Commission made corresponding changes in its Comments. The content of the bill was closely watched by major stakeholders such as the Judicial Council, the State Bar, the California Dispute Resolution Council, the Civil Justice Association of California, the California Defense Counsel, and the Consumer Attorneys of California.

136. *See* 1997 Cal. Stat. ch. 722; *see also Report of the California Law Revision Commission on Chapter 722 of the Statutes of 1997 (Assembly Bill 939)*, 27 Cal. L. Revision Comm’n Reports 595 (1997); *Mediation Confidentiality*, 26 Cal. L. Revision Comm’n Reports 407 (1996) (hereafter, “CLRC Mediation Recommendation #2”).

137. Only a few minor revisions have been made since 1997. *See* 2010 Cal. Stat. ch. 328, § 64; 2009 Cal. Stat. ch. 88, § 35; 2007 Cal. Stat. ch. 130, § 84.

138. Former Evid. Code § 1152.5 (1996 Cal. Stat. ch. 174, § 1).

139. Former Evid. Code § 1152.6 (1995 Cal. Stat. ch. 576, § 8).

140. *See* Evid. Code §§ 1115(c), 1119, 1120, 1121, 1123 & 1127 & Comments.

1 admissibility of evidence of settlement negotiations) were left unchanged; they  
2 remain as previously described.

3 A major objective of the 1997 reform was to resolve a conflict between two  
4 court of appeal decisions on the enforceability of an oral compromise that parties  
5 reach in mediation but never convert to a fully executed settlement agreement  
6 because the parties cannot agree on the terms.<sup>141</sup> Prompt resolution of that conflict  
7 was crucial, because a mediating disputant must be able to determine when an  
8 opponent is effectively bound.<sup>142</sup>

9 The 1997 bill also revised the law on the enforceability of a *written* agreement  
10 reached through mediation, in two key respects.<sup>143</sup> Those two reforms, plus  
11 resolution of the conflict on enforceability of an oral compromise reached in

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141. One of those decisions held that such an oral compromise was inadmissible pursuant to former Section 1152.5 and therefore unenforceable. See *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994). The other decision held that mediation ended once the parties reached an oral compromise, so former Section 1152.5 did not apply to the compromise and it was enforceable. See *Regents of the University of California v. Sumner*, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996).

142. *CLRC Mediation Recommendation #2*, *supra* note 136, at 427. The new chapter on mediation confidentiality addressed the conflict by (1) specifying a statutory procedure for orally memorializing an agreement, in the interest of efficiency (see Evid. Code § 1118 & Comment), (2) creating an exception to mediation confidentiality when parties follow that statutory procedure or certain other requirements are satisfied (see Evid. Code § 1124 & Comment), (3) providing specific guidance on when mediation ends for purposes of applying mediation confidentiality (see Evid. Code § 1125), and (4) making clear that “[a]nything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under this chapter before a mediation ends, shall remain inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends” (Evid. Code § 1126).

The Commission’s Comment to Section 1124 explains:

Section 1124 sets forth specific circumstances under which mediation confidentiality is inapplicable to an oral agreement reached through mediation. Except in those circumstances, Sections 1119 (mediation confidentiality) and 1124 codify the rule of *Ryan v. Garcia*, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (mediation confidentiality applies to oral statement of settlement terms), and reject the contrary approach of *Regents of University of California v. Sumner*, 42 Cal. App. 4th 1209, 50 Cal. Rptr. 2d 200 (1996) (mediation confidentiality does not protect oral statement of settlement terms).

143. Those two reforms were:

(1) Under prior law, unless it was offered to prove fraud, duress, or illegality, a written agreement reached in mediation was admissible (and therefore enforceable) only if it expressly provided that it was admissible or subject to disclosure. See former Evid. Code § 1152.5(a)(2) (1996 Cal. Stat. ch. 174, § 1). The Commission considered that requirement overly rigorous; the law was thus revised to also make such an agreement admissible if it provides that it is “enforceable” or “binding” or words to that effect. See Evid. Code § 1123 & Comment; see also *CLRC Mediation Recommendation #2*, *supra* note 136, at 423.

(2) Prior law was unclear regarding whose assent had to be obtained to disclose a written settlement agreement that *did not* contain the “magic language” described in the preceding paragraph. The 1997 bill made clear that it was only necessary to obtain assent from the parties, not from the mediator or other mediation participants. See Evid. Code § 1123 Comment; see also *CLRC Mediation Recommendation #2*, *supra* note 136, at 423.

1 mediation, were the “most crucial” aspect of the legislation.<sup>144</sup> The bill made  
2 various other revisions as well.<sup>145</sup>

3 *Core Substance of Existing Law*

4 The chapter on mediation confidentiality begins by defining “mediation” as “a  
5 process in which a neutral person or persons facilitate communication between the  
6 disputants to assist them in reaching a mutually acceptable agreement.”<sup>146</sup> The  
7 chapter also defines “mediator”<sup>147</sup> and “mediation consultation.”<sup>148</sup>

8 The key provision in the chapter is Evidence Code Section 1119, which restricts  
9 the admissibility and discoverability of mediation communications, and also  
10 provides for confidentiality. It provides:

11 1119. Except as otherwise provided in this chapter:

12 (a) No evidence of anything said or any admission made for the purpose of, in  
13 the course of, or pursuant to, a mediation or a mediation consultation is  
14 admissible or subject to discovery, and disclosure of the evidence shall not be  
15 compelled, in any arbitration, administrative adjudication, civil action, or other  
16 noncriminal proceeding in which, pursuant to law, testimony can be compelled to  
17 be given.

18 (b) No writing, as defined in Section 250, that is prepared for the purpose of, in  
19 the course of, or pursuant to, a mediation or a mediation consultation, is  
20 admissible or subject to discovery, and disclosure of the writing shall not be  
21 compelled, in any arbitration, administrative adjudication, civil action, or other  
22 noncriminal proceeding in which, pursuant to law, testimony can be compelled to  
23 be given.

24 (c) All communications, negotiations, or settlement discussions by and between  
25 participants in the course of a mediation or a mediation consultation shall remain  
26 confidential.

27 Contrary to what some sources say,<sup>149</sup> the protection under this provision is not  
28 absolute. There are not many exceptions and limitations, however, and the ones  
29 that exist are relatively clear-cut and easy to apply.

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144. *CLRC Mediation Recommendation #2*, *supra* note 136, at 424.

145. For a description of those revisions, see CLRC Staff Memorandum 2013-39, pp. 13-15.

146. Evid. Code § 1115(a). “The definition focuses on the nature of a proceeding, not its label.” Evid. Code § 1115 Comment. Thus, a proceeding may be a “mediation” for purposes of the chapter on mediation confidentiality, even though it is denominated differently.” *Id.*

147. A “mediator” is “a neutral person who conducts a mediation.” Evid. Code § 1115(b). The term encompasses “any person designated by a mediator either to assist in the mediation or to communicate with the participants in preparation for a mediation.” *Id.*

148. A “mediation consultation” is “a communication between a person and a mediator for the purpose of initiating, considering, or reconvening a mediation or retaining the mediator.” Evid. Code § 1115(c).

149. See, e.g., Cole, *supra* note 5, at 1454 (“[F]or some states, creation of an absolute mediation privilege for mediation communications is a preferable policy choice. In 2002, for example, California enacted a very broad mediation privilege state shortly before the UMA was finalized.”).



Of particular importance, the protection of Section 1119 applies *only* in a *noncriminal* proceeding. It does *not* restrict the use of mediation communications in a *criminal* case.<sup>150</sup>

Other exceptions and limitations include:

- **Preexisting evidence.** Evidence that was admissible or subject to discovery before a mediation does not become inadmissible or protected from disclosure upon being used in a mediation.<sup>151</sup>
- **Specified agreements.** The rule does not restrict the admissibility of an agreement to mediate a dispute, an agreement not to take a default, or an agreement for an extension of time in a pending civil action.<sup>152</sup>
- **Mediator background.** The rule does not prevent disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.<sup>153</sup>
- **Financial disclosure declarations exchanged in a divorce proceeding.** An appellate court recently explained that such declarations are required by the Family Code, not because of mediation, and thus they are *not* mediation communications even though they are exchanged during mediation.<sup>154</sup>
- **Excluded proceedings.** The rule does not apply to a court settlement conference, a family conciliation proceeding, or a court-connected mediation of child custody and visitation issues.<sup>155</sup>
- **Constitutional rights.** The rule does not apply if it conflicts with a constitutional right, such as the right of due process,<sup>156</sup> or a juvenile’s constitutional right of confrontation in a juvenile delinquency proceeding.<sup>157</sup>
- **Absurd results.** The rule does not apply if it would “lead to absurd results that clearly undermine the statutory purpose.”<sup>158</sup>
- **Express agreement to waive protection.** The rule does not prevent admissibility or disclosure of mediation materials if *all* of the participants in a mediation expressly agree in writing (or orally, pursuant to a specified procedure) to waive the protection.<sup>159</sup> In recommending this approach, the

150. See, e.g., *Cassel*, 51 Cal. 4th at 135 n.11.

151. Evid. Code § 1120(a); see also *Rojas v. Superior Court*, 33 Cal. 4th 407, 423 n.8, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2004); *Kullar v. Foot Locker Retail, Inc.*, 168 Cal. App. 4th 116, 132, 85 Cal. Rptr. 3d 20 (2008).

152. Evid. Code § 1120(b)(1)-(2).

153. Evid. Code § 1120(b)(3).

154. *Lappe v. Superior Court*, 232 Cal. App. 4th 774, 181 Cal. Rptr. 3d 510 (2014). A bill to codify the holding of *Lappe* is pending. See SB 217 (Wieckowski) (as introduced Feb. 1, 2017). The Commission takes no position on that bill or any other pending bill. See *supra* note 123.

155. Evid. Code § 1117(b).

156. *Cassel*, 51 Cal. 4th at 119, 127.

157. See *Rinaker v. Superior Court*, 62 Cal. App. 4th 155, 72 Cal. Rptr. 2d 464 (1998).

158. *Cassel*, 51 Cal. 4th at 119.

159. Evid. Code § 1122(a)(1).

Commission explained that “[a]ll persons attending a mediation, parties as well as nonparties, should be able to speak frankly, without fear of having their words turned against them.”<sup>160</sup> If a communication or writing was prepared by or on behalf of fewer than all of the mediation participants, only an express waiver by those participants is needed.<sup>161</sup>

- **Settlement agreement.** The rule does not prevent admissibility or disclosure of a written settlement agreement signed by the settling parties if certain requirements are met.<sup>162</sup> An oral settlement agreement may also be used, but only if it was prepared in accordance with a statutory procedure and meets certain requirements.<sup>163</sup>
- **Conduct not intended as an assertion.** The rule does not protect conduct at a mediation, only mediation communications.<sup>164</sup>

To help persons determine whether their statements are protected by Section 1119, the chapter on mediation confidentiality includes a provision specifying when a mediation ends.<sup>165</sup> Among other circumstances, a mediation ends when the parties execute a written settlement fully resolving the mediated dispute, or complete a statutory procedure for orally agreeing to fully resolve the dispute.<sup>166</sup> Anything made inadmissible or otherwise protected by the chapter on mediation confidentiality *before* a mediation ends remains so protected *after* the mediation ends.<sup>167</sup>

Another important provision in the chapter on mediation confidentiality is Section 1121, which generally precludes a mediator or anyone else from reporting to a court regarding the substance of a mediation. That provision is similar to the earlier provision on the same topic, but more clear in a number of respects.<sup>168</sup>

160. CLRC Mediation Recommendation #2, *supra* note 136, at 425.

161. Evid. Code § 1122(a)(2).

162. Evid. Code § 1123.

163. Evid. Code § 1124.

164. See, e.g., *Foxgate*, 25 Cal. 4th at 18 n.14; *Radford v. Shehorn*, 187 Cal. App. 4th 852, 857, 114 Cal. Rptr. 3d 499 (2010); *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.*, 163 Cal. App. 4th 566, 571-72, 77 Cal. Rptr. 3d 551 (2008); see also *Ellerbee v. County of Los Angeles*, 187 Cal. App. 4th 1206, 1216-17, 114 Cal. Rptr. 3d 756 (2010).

165. Evid. Code § 1125.

166. Evid. Code § 1125(a)(1)-(2).

167. Evid. Code § 1126.

168. Section 1121 provides:

1121. Neither a mediator nor anyone else may submit to a court or other adjudicative body, and a court or other adjudicative body may not consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning a mediation conducted by the mediator, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise in writing, or orally in accordance with Section 1118.

The focus of this provision is on preventing coercion. As the Commission’s Comment explains, “a mediator should not be able to influence the result of a mediation or adjudication by reporting or

1 If a mediator is subpoenaed to testify or produce a writing, and a court or other  
2 adjudicative body determines that the evidence is inadmissible under the chapter  
3 on mediation confidentiality, the mediator is entitled to attorney's fees.<sup>169</sup>  
4 Similarly, any reference to a mediation in a subsequent trial or other adjudication  
5 is an irregularity in the proceedings.<sup>170</sup>

6 ***Additional Sources of Protection for Mediation Communications***

7 The mediation confidentiality statutes described above (Sections 1115-1128) are  
8 not the only potential source of evidentiary protection for mediation  
9 communications. Other provisions that may limit the admissibility or disclosure of  
10 such communications include California's constitutional right of privacy,<sup>171</sup>  
11 various specialized mediation confidentiality provisions,<sup>172</sup> Section 1160 (relating  
12 to benevolent conduct),<sup>173</sup> and the previously discussed provisions on a mediator's  
13 competency to testify (Section 703.5) and the admissibility of evidence of  
14 settlement negotiations (Sections 1152 and 1154).

15 In addition, mediation participants sometimes enter into contractual agreements  
16 restricting disclosure of mediation communications. Issues might arise, however,  
17 regarding enforcement as to third parties and protection of public policies.

18 California's mediation statutes do not address the validity of a contractual  
19 requirement to keep settlement terms confidential. That issue (sometimes referred  
20 to as "settlement in sunshine") arises with regard to all settlements, not just  
21 mediated settlements. It is governed by other law.<sup>174</sup>

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threatening to report to the decisionmaker on the merits of the dispute or reasons why mediation failed to resolve it." Likewise, "a mediator should not have authority to resolve or decide the mediated dispute, and should not have any function for the adjudicating tribunal with regard to the dispute, except as a non-decisionmaking neutral." Section 1121 Comment.

169. Evid. Code. § 1127.

170. Evid. Code. § 1128.

171. Cal. Const. art. I, § 1; see also *Garstang v. Superior Court*, 39 Cal. App. 4th 526, 532, 46 Cal. Rptr. 2d 84 (1995).

172. See, e.g., Fam. Code §§ 1818 (family conciliation court), 3177 (child custody); Gov't Code §§ 12984-12985 (housing discrimination).

173. Section 1160 states in part: "The portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involving in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action."

174. See, e.g., Code Civ. Proc. § 2017.310 ("Notwithstanding any other provision of law, it is the policy of the State of California that confidential settlement agreements are disfavored in any civil action the factual foundation for which establishes a cause of action for a violation of the Elder Abuse and Dependent Adult Civil Protection Act (Chapter 11 (commencing with Section 15600) of Part 3 of Division 9 of the Welfare and Institutions Code).").

**California Supreme Court Decisions on Mediation Confidentiality**

1 Since the enactment of the chapter on mediation confidentiality, the California  
2 Supreme Court has issued five decisions interpreting provisions within the  
3 chapter. Those decisions are described in chronological order below. The first four  
4 cases are described only briefly;<sup>175</sup> the last decision (*Cassel*) is discussed in greater  
5 detail because it most directly concerns the topic of this study.

***Foxgate***

7 *Foxgate Homeowners' Ass'n v. Bramalea California, Inc.*<sup>176</sup> involved a  
8 mediation conducted pursuant to a case management order, which directed the  
9 parties to make their best efforts to cooperate during the mediation process. The  
10 plaintiffs' attorney came to the mediation with nine experts, but the defense  
11 showed up late and without any experts, despite a court notice to bring experts  
12 along. The mediation did not result in an agreement; the mediator ended it earlier  
13 than expected, concluding that mediation without defense experts would be  
14 fruitless.

15 Thereafter, the plaintiff sought sanctions from the defense for failing to  
16 cooperate at the mediation. In connection with the plaintiff's motion, the mediator  
17 filed a report that described the mediation session in detail, accused the defense of  
18 obstructive and bad faith tactics, and recommended awarding sanctions.<sup>177</sup>

19 The defense contended that the mediation confidentiality statutes barred  
20 consideration of the mediator's report. The trial court disagreed and awarded  
21 sanctions, but the court of appeal reversed and remanded, ruling that the some but  
22 not all of the mediator's report was admissible pursuant to an implied exception to  
23 the mediation confidentiality statutes.

24 On further appeal, the California Supreme Court determined that "there are no  
25 exceptions to the confidentiality of mediation communications or to the statutory  
26 limits on the content of mediator's reports."<sup>178</sup> The Court explained:

27 Because the language of sections 1119 and 1121 is clear and unambiguous,  
28 judicial construction of the statutes is not permitted unless they cannot be applied  
29 according to their terms or doing so would lead to absurd results, thereby  
30 violating the presumed intent of the Legislature. Moreover, a judicially crafted  
31 exception to the confidentiality mandated by sections 1119 and 1121 is not  
32 necessary either to carry out the legislative intent or to avoid an absurd result.

33 The legislative intent underlying the mediation confidentiality provisions of the  
34 Evidence Code is clear. The parties and all amici curiae recognize the purpose of  
35 confidentiality is to promote "a candid and informal exchange regarding events in  
36 the past .... This frank exchange is achieved only if the participants know that

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175. For more detailed discussions of those decisions, see CLRC Staff Memorandum 2013-39, pp. 18-25.

176. 26 Cal. 4th 1, 15, 25 P.3d 1117, 128 Cal. Rptr. 2d 642 (2001).

177. *Id.* at 6.

178. *Id.* at 4.

1        what is said in the mediation will not be used to their detriment through later court  
2        proceedings and other adjudicatory processes.”<sup>179</sup>

3        The Court also distinguished two decisions in which other courts found  
4        exceptions to mediation confidentiality: *Rinaker v. Superior Court*<sup>180</sup> and *Olam v.*  
5        *Congress Mortgage Co.*<sup>181</sup> The Court explained that in *Rinaker*, the statutory right  
6        of mediation confidentiality was trumped by a juvenile delinquency defendant’s  
7        constitutional right to confront a witness with inconsistent mediation statements,  
8        but *Foxgate* involved “no comparable supervening due-process-based right to use  
9        evidence of statements and events at the mediation session.”<sup>182</sup>

10       The Court further explained that in *Olam*, both sides (but not the mediator) had  
11       waived mediation confidentiality and mediation evidence was crucial to achieve  
12       justice. In contrast, the *Foxgate* defendants had not waived confidentiality, so  
13       *Olam* was inapposite.<sup>183</sup>

14       The Court therefore concluded that the order imposing sanctions was based on  
15       wrongfully admitted mediation communications and had to be set aside.<sup>184</sup> The  
16       Court made clear, however, that “neither section 1119 nor section 1121 prohibits a  
17       party from revealing or reporting to the court about noncommunicative conduct,  
18       including violation of the orders of a mediator or the court during mediation.”<sup>185</sup>  
19       Thus, the plaintiff could renew its sanctions motion on remand, so long as that  
20       motion was based on noncommunicative conduct rather than mediation  
21       communications.<sup>186</sup>

## 22       ***Rojas***

23       Three years after *Foxgate*, the California Supreme Court again considered the  
24       mediation confidentiality statutes, in *Rojas v. Superior Court*.<sup>187</sup> This time, the  
25       case concerned the discoverability of materials that had been prepared in  
26       connection with an earlier dispute, which had settled through mediation.

27       The trial court denied discovery of certain materials on grounds of mediation  
28       confidentiality. The court of appeal reached a different result, interpreting the  
29       mediation confidentiality statutes to be implicitly subject to the same three-prong  
30       analysis as the work product privilege: (1) material reflecting *only* an attorney’s  
31       impressions, conclusions, opinions, or legal research or theories is absolutely

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179. *Id.* at 14 (citations omitted).

180. 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998).

181. 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

182. *Foxgate*, 26 Cal. 4th at 15-16.

183. *Id.* at 16-17.

184. *Id.* at 18.

185. *Id.* at 18 n.14.

186. *Id.* at 18.

187. 33 Cal. 4th 407, 93 P.3d 260, 15 Cal. Rptr. 3d 643 (2004).

1 protected, (2) material that does not reflect an attorney’s impressions, conclusions,  
2 opinions, or legal research or theories is *not* protected, and (3) derivative material  
3 (material that contains an amalgamation of factual information and an attorney’s  
4 impressions, conclusions, opinions, or legal research or theories) is discoverable  
5 only upon a showing of good cause, which involves balancing the need for the  
6 material against the purposes served by mediation confidentiality.

7 The California Supreme Court disagreed with that interpretation of the  
8 mediation confidentiality statutes, stating that it was contrary to both the statutory  
9 language and the legislative intent.<sup>188</sup> The Court’s lengthy analysis quoted heavily  
10 from *Foxgate* and relied extensively on Commission materials.<sup>189</sup> Among other  
11 things, the Court explained:

12 In *Foxgate*, we stated that “to carry out the purpose of encouraging mediation  
13 by ensuring confidentiality, [our] statutory scheme ... unqualifiedly bars  
14 disclosure of” specified communications and writings associated with a mediation  
15 “absent an *express statutory* exception.” We also found that the “judicially crafted  
16 exception” to section 1119 there at issue was “not necessary either to carry out the  
17 legislative intent or to avoid an absurd result.” We reach the same conclusion  
18 here; as [the trial judge] observed, “the mediation privilege is an important one,  
19 and if courts start dispensing with it by using the [test governing the work-product  
20 privilege], you may have people less willing to mediate.”<sup>190</sup>

21 The Court thus again interpreted Section 1119 strictly, refusing to imply a  
22 “judicially crafted exception.” In so doing, however, the Court recognized that  
23 Section 1120 creates an express (not implied) exception to mediation  
24 confidentiality for preexisting materials.<sup>191</sup> The Court also pointed out that  
25 physical samples do not constitute “writings” and thus do not fall within the  
26 protection of the mediation confidentiality statutes.<sup>192</sup>

### 27 ***Fair***

28 The next California Supreme Court decision relating to mediation  
29 confidentiality was *Fair v. Bakhtiari*,<sup>193</sup> in which the Court considered how to  
30 construe the exception for a written settlement agreement that is signed by the  
31 settling parties and provides that it is “enforceable or binding or words to that

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188. *Id.* at 411.

189. *Id.* at 415-24.

190. *Id.* at 424 (citations omitted; emphasis in *Rojas*).

191. *Id.* at 417 (“under section 1120, a party cannot secure protection for a writing — including a photograph, a witness statement, or an analysis of a test sample — that was not ‘prepared for the purpose of, in the course of, or pursuant to, a mediation’ ... simply by using or introducing it in a mediation or even including it as part of a writing — such as a brief or a declaration or a consultant’s report — that was ‘prepared for the purpose of, in the course of, or pursuant to, a mediation.’”).

192. *Id.* at 416.

193. 40 Cal. 4th 189, 147 P.3d 653, 51 Cal. Rptr. 3d 871 (2006).

1 effect.”<sup>194</sup> The agreement in question did not include language along those lines,  
2 but did include an arbitration clause.

3 The Court determined that inclusion of an arbitration clause was not sufficient to  
4 satisfy the statutory requirement.<sup>195</sup> The Court thus interpreted the mediation  
5 confidentiality exception narrowly, not broadly.

6 In so doing, the Court noted that confidentiality “is essential to effective  
7 mediation”<sup>196</sup> and explained:

8 A tentative working document may include an arbitration provision, without  
9 reflecting an actual agreement to be bound. If such a typical settlement provision  
10 were to trigger admissibility, parties might inadvertently give up the protection of  
11 mediation confidentiality during their negotiations over the terms of settlement.  
12 Disputes over those terms would then erupt in litigation, escaping the process of  
13 resolution through mediation. Durable settlements are more likely to result if the  
14 statute is applied to require language directly reflecting the parties’ awareness that  
15 they are executing an “enforceable or binding” agreement.<sup>197</sup>

16 The Court further explained that under its interpretation of the exception, “the  
17 parties are free to draft and discuss enforcement terms such as arbitration clauses  
18 without worrying that those provisions will destroy the confidentiality that protects  
19 mediation discussions.”<sup>198</sup> Thus, as in *Foxgate* and *Rojas*, the Court was sensitive  
20 to the legislative policy of protecting mediation confidentiality, and careful to  
21 interpret the statutory protection so as to be effective.

## 22 *Simmons*

23 In 2008, the California Supreme Court considered mediation confidentiality yet  
24 again, in *Simmons v. Ghaderi*.<sup>199</sup> The key question before the Court was whether a  
25 waiver of mediation confidentiality had to be express or could also be implied  
26 from a person’s conduct.

27 The Court determined that the mediation confidentiality statutes unambiguously  
28 require any waiver of mediation confidentiality to be express, not implied.<sup>200</sup> The  
29 Court further noted that except where due process is implicated or there is an  
30 express waiver, those statutes must be “strictly enforced.”<sup>201</sup>

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194. Evid. Code § 1123(b).

195. *Fair*, 40 Cal. 4th at 197 (“[W]e hold that to satisfy the ‘words to that effect’ provision of section 1123(b), a writing must directly express the parties’ agreement to be bound by the document they sign.”).

196. *Id.*, quoting *Foxgate*, 26 Cal. 4th at 14.

197. *Fair*, 40 Cal. 4th at 197-98.

198. *Id.* at 199.

199. 44 Cal. 4th 570, 187 P.3d 934, 80 Cal. Rptr. 3d 83 (2008).

200. *Id.* at 586.

201. *Id.* at 582.

1 The Court therefore refused to create a waiver-by-conduct exception to the  
2 mediation confidentiality statutes. It explained:

3 [T]he legislative history of the mediation confidentiality statutes as a whole  
4 reflects a desire that section 1115 et seq. be strictly followed in the interest of  
5 efficiency. By laying down clear rules, the Legislature intended to reduce  
6 litigation over the admissibility and disclosure of evidence regarding settlements  
7 and communications that occur during mediation. Allowing courts to craft judicial  
8 exceptions to the statutory rules would run counter to that intent.

9 Both the clear language of the mediation statutes and our prior rulings support  
10 the preclusion of an implied waiver exception. The Legislature chose to promote  
11 mediation by ensuring confidentiality rather than adopt a scheme to ensure good  
12 behavior in the mediation and litigation process. The mediation statutes provide  
13 clear and comprehensive rules reflecting that policy choice.<sup>202</sup>

14 The Court thus stuck to its firm approach prohibiting courts from judicially  
15 crafting exceptions to the mediation confidentiality rules.

16 *Cassel*

17 The most recent California Supreme Court decision on mediation confidentiality  
18 is *Cassel v. Superior Court*,<sup>203</sup> which prompted the Commission's current study. In  
19 that case, a man agreed in mediation to settle a lawsuit to which he was a party. He  
20 later sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach  
21 of contract. He claimed that at the mediation, his attorneys "by bad advice,  
22 deception, and coercion" persuaded him to settle for less than he had told them he  
23 would accept and less than the case was worth.<sup>204</sup>

24 *Trial court proceedings.* The defendant attorneys moved, under the mediation  
25 confidentiality statutes, to exclude all evidence of private attorney-client  
26 discussions, made immediately preceding or during the mediation, concerning  
27 mediation settlement strategies or the attorneys' efforts to persuade their client to  
28 reach a settlement in the mediation.<sup>205</sup> The trial court granted the motion and an  
29 appeal was taken.<sup>206</sup>

30 *Court of Appeal decision.* The court of appeal reversed, ruling that mediation  
31 confidentiality did not apply. It reasoned that the mediation confidentiality statutes  
32 are "not intended to prevent a client from proving, through private  
33 communications outside the presence of all other mediation participants, a case of  
34 legal malpractice against the client's own lawyers."<sup>207</sup> It further reasoned that an  
35 attorney and client are a single "participant" for purposes of mediation

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202. *Id.* at 588 (emphasis added; citation omitted).

203. 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

204. *Id.* at 118.

205. *Id.*

206. *Id.*

207. *Id.* at 122.



1 confidentiality, and thus the attorney cannot preclude the client from waiving the  
2 statutory protection.<sup>208</sup>

3 *California Supreme Court decision.* The defendant attorneys petitioned for  
4 review in the California Supreme Court, maintaining that their mediation-related  
5 discussions with their client were inadmissible in his malpractice action against  
6 them, “even if those discussions occurred in private, away from any other  
7 mediation participant.”<sup>209</sup> *Id.* at 123. The Court granted review and, consistent with  
8 its previous decisions, held that the mediation confidentiality statutes must be  
9 strictly construed and are not subject to a judicially crafted exception where a  
10 client sues for legal malpractice and seeks disclosure of private attorney-client  
11 discussions relating to a mediation.<sup>210</sup>

12 Preliminarily, the Court explained that it had to apply the plain terms of the  
13 mediation confidentiality statutes unless the result would violate due process or  
14 lead to absurd results that would clearly undermine the statutory purpose.<sup>211</sup> The  
15 plain terms of Section 1119(a)-(b) cover all oral or written communications made  
16 “for the purpose of” or “pursuant to” a mediation.<sup>212</sup> The Court thus concluded that  
17 such communications include those between a mediation disputant and the  
18 disputant’s own attorney, even if the communications do not occur in the presence  
19 of the mediator or other disputants.<sup>213</sup>

20 The Court also explained that an attorney and client are not a single  
21 “participant” for purposes of the mediation confidentiality statutes, because those  
22 statutes mention “participants” several times, under circumstances making clear  
23 that the term encompasses more than just the mediation parties and disputants.<sup>214</sup>  
24 Consequently, the Court ruled that the mediation confidentiality protection could  
25 not be waived without the attorney’s consent; the client’s consent alone was not  
26 sufficient.<sup>215</sup>

27 The Court also rejected the idea that Section 958, which expressly creates an  
28 exception to the attorney-client privilege for legal malpractice suits, compels  
29 recognition of a similar exception to mediation confidentiality.<sup>216</sup> The Court  
30 explained:

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208. *Id.* Justice Perluss dissented, “argu[ing] that the majority had crafted a forbidden judicial exception to the clear requirements of mediation confidentiality.” *Id.*

209. *Id.* at 123.

210. *Id.* at 123-33.

211. *Id.* at 119.

212. *Id.* at 128.

213. *Id.*

214. *Id.* at 130.

215. *Id.* at 131.

216. *Id.* at 131-33.

1 [T]he mediation confidentiality statutes do not create a “privilege” in favor of  
2 any particular person. Instead, they serve the public policy of encouraging the  
3 resolution of disputes by means short of litigation. The mediation confidentiality  
4 statutes govern only the narrow category of mediation-related communications,  
5 but they apply broadly within that category, and are designed to provide  
6 maximum protection for the privacy of communications in the mediation context.  
7 A principal purpose is to assure prospective participants that their interests will  
8 not be damaged, first, by attempting this alternative means of resolution, and then,  
9 once mediation is chosen, by making and communicating the candid disclosures  
10 and assessments that are most likely to produce a fair and reasonable mediation  
11 settlement. To assure this maximum privacy protection, the Legislature has  
12 specified that all mediation participants involved in a mediation-related  
13 communication must agree to its disclosure.

14 Neither the language nor the purpose of the mediation confidentiality statutes  
15 supports a conclusion that they are subject to an exception, similar to that  
16 provided for the attorney-client privilege, for lawsuits between attorney and  
17 client. The instant Court of Appeal’s contrary conclusion is nothing more than a  
18 judicially crafted exception to the unambiguous language of the mediation  
19 confidentiality statutes in order to accommodate a competing policy concern —  
20 here, protection of a client’s right to sue his or her attorney. We and the Courts of  
21 Appeal have consistently disallowed such exceptions, even when the equities  
22 appeared to favor them.<sup>217</sup>

23 The Court further explained that applying the mediation confidentiality statutes  
24 to a legal malpractice case “does not implicate due process concerns so  
25 fundamental that they might warrant an exception on constitutional grounds.”<sup>218</sup> In  
26 its view, “the mere loss of evidence pertinent to the prosecution of a lawsuit for  
27 civil damages does not implicate such a fundamental interest.”<sup>219</sup>

28 The Court expressly refrained from passing judgment on the wisdom of the  
29 mediation confidentiality statutes.<sup>220</sup> It concluded, however, that applying the plain  
30 terms of those statutes to the case before it did not produce a result that was either  
31 absurd or contrary to the legislative intent.<sup>221</sup> The Court explained:

32 Inclusion of private attorney-client discussions in the mediation confidentiality  
33 scheme addresses several issues about which the Legislature could rationally be  
34 concerned. At the outset, the Legislature might determine, such an inclusion gives  
35 maximum assurance that disclosure of an ancillary mediation-related  
36 communication will not, perhaps inadvertently, breach the confidentiality of the  
37 mediation proceedings themselves, to the damage of one of the mediation  
38 disputants.

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217. *Id.* at 131 (citations & footnotes omitted).

218. *Id.* at 135.

219. *Id.*

220. *Id.* at 136.

221. *Id.*

1        Moreover, as real parties observe, the Legislature might reasonably believe that  
2        protecting attorney-client conversations in this context facilitates the use of  
3        mediation as a means of dispute resolution by allowing frank discussions between  
4        a mediation disputant and the disputant's counsel about the strengths and  
5        weaknesses of the case, the progress of negotiations, and the terms of a fair  
6        settlement, without concern that the things said by either the client or the lawyers  
7        will become the subjects of later litigation against either. The Legislature also  
8        could rationally decide that it would not be fair to allow a client to support a  
9        malpractice claim with excerpts from private discussions with counsel concerning  
10       the mediation, while barring the attorneys from placing such discussions in  
11       context by citing communications within the mediation proceedings  
12       themselves.<sup>222</sup>

13       The Court therefore reversed the decision of the court of appeal, but noted that  
14       “the Legislature is free to reconsider whether the mediation confidentiality statutes  
15       should preclude the use of mediation-related attorney-client discussions to support  
16       a client's civil claims of malpractice against his or her attorneys.”<sup>223</sup>

17       *Justice Chin's concurrence.* Justice Chin concurred in the result, “but  
18       reluctantly.”<sup>224</sup> He warned that the court's holding would

19       effectively shield an attorney's actions during mediation, including advising the  
20       client, from a malpractice action even if those actions are incompetent or even  
21       deceptive. Attorneys participating in mediation will not be held accountable for  
22       any incompetent or fraudulent actions during that mediation unless the actions are  
23       so extreme as to engender a *criminal* prosecution against the attorney. This is a  
24       high price to pay to preserve total confidentiality in the mediation process.<sup>225</sup>

25       Justice Chin regarded it as a close call whether the result required by the literal  
26       language of the mediation confidentiality statutes was so absurd as to warrant a  
27       judicial deviation from the literal language.<sup>226</sup> For several reasons, he agreed with  
28       the majority that the Court had to give effect to the statutory language.<sup>227</sup> He was  
29       unsure, however, whether the Legislature had “fully considered whether attorneys  
30       should be shielded from accountability in this way.”<sup>228</sup>

31       He thought there might be better ways to balance the competing interests than  
32       “simply providing that an attorney's statements during mediation may never be  
33       disclosed.”<sup>229</sup> In particular, he suggested permitting use of mediation  
34       communications in a legal malpractice action to the extent they are relevant to that

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222. *Id.*

223. *Id.* at 137.

224. *Id.* at 138 (Chin, J., concurring).

225. *Id.* (citations and footnotes omitted; emphasis in original).

226. *Id.* at 139.

227. *Id.*

228. *Id.*

229. *Id.*

1 action, but preventing use of those communications for any other purpose.<sup>230</sup> He  
2 thus urged the Legislature to reconsider the statutory scheme.<sup>231</sup>

3 **Other Decisions on the Intersection of Mediation Confidentiality and Alleged Attorney**  
4 **Misconduct Under California Law**

5 In its resolution assigning this study to the Commission,<sup>232</sup> the Legislature  
6 specifically directed the Commission to consider *Cassel* and two other California  
7 cases: *Wimsatt v. Superior Court*<sup>233</sup> and *Porter v. Wyner*.<sup>234</sup> Both of those  
8 decisions involved the intersection of California's mediation confidentiality  
9 statutes and allegations of attorney misconduct.

10 This section of the Commission's report describes *Wimsatt* and *Porter*. The  
11 Commission then discusses some other decisions that involved the intersection of  
12 California's mediation confidentiality statutes and allegations of attorney  
13 misconduct.<sup>235</sup>

14 ***Wimsatt***

15 *Wimsatt* was a legal malpractice case in which the client alleged that his  
16 attorneys lowered the settlement demand in a personal injury case without his  
17 authorization, impairing his ability to obtain a satisfactory settlement of the  
18 personal injury case. The client claimed to have learned of this misconduct from a  
19 confidential mediation brief prepared by his opponents in the personal injury case.

20 *Discovery dispute.* To support his malpractice allegations, the client first  
21 deposed one of the attorney defendants, who denied having lowered the settlement  
22 demand in the personal injury case.<sup>236</sup> The client then sought discovery of the  
23 mediation briefs, some emails written shortly before the mediation in which the  
24 personal injury case settled, and any evidence showing there was a conversation in  
25 which his attorney lowered his settlement demand without authorization. The  
26 attorney defendants sought a protective order, contending that the information  
27 sought was protected from disclosure under the mediation confidentiality statutes.

28 The trial judge denied the application for a protective order. He reasoned that (1)  
29 the client was trying to show that the deposed attorney had lied under oath, and (2)

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230. *Id.*

231. *See id.*

232. 2012 Cal. Stat. res. ch. 108.

233. 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200 (2007).

234. 107 Cal. Rptr. 3d 653 (2010) (formerly published at 183 Cal. App. 4th 949).

235. For discussion of cases involving the intersection of mediation confidentiality and allegations of misconduct by a mediator, party, or other non-attorney participant, see CLRC Staff Memorandum 2015-4, pp. 19-28; see also Memorandum 2015-36, pp. 1-2.

236. The client waived the attorney-client privilege. *Wimsatt*, 152 Cal. App. 4th at 144.

1 the mediation confidentiality statutes did not apply because the Legislature did not  
2 intend to have them shield perjury or inconsistent statements.<sup>237</sup>

3 The defendant attorneys sought review in the court of appeals, which issued an  
4 opinion describing California’s strict mediation confidentiality scheme and the  
5 California Supreme Court’s decisions in *Foxgate* and *Rojas*.<sup>238</sup> The opinion also  
6 pointed out that mediation briefs “are part and parcel of the mediation negotiation  
7 process” and “epitomize the types of writings which the mediation confidentiality  
8 statutes have been designed to protect from disclosure.”<sup>239</sup> The court further  
9 explained that the requested emails “were materially related to the mediation that  
10 was to be held the next day” and “would not have existed had the mediation briefs  
11 not been written.”<sup>240</sup>

12 The court of appeals therefore held that the mediation briefs and eve-of-  
13 mediation emails were protected by the mediation confidentiality statutes.<sup>241</sup> It  
14 considered that result necessary because the California Supreme Court had  
15 repeatedly “refused to judicially create exceptions to the statutory scheme, even in  
16 situations where justice seems to call for a different result.”<sup>242</sup>

17 The court of appeals further held, however, that the trial judge should *not* grant a  
18 protective order with regard to the conversation in which the deposed attorney  
19 purportedly lowered the client’s settlement demand without authorization.<sup>243</sup> It  
20 explained that the attorney defendants were required to show that the conversation  
21 was protected by mediation confidentiality, but they had not demonstrated that the  
22 conversation was linked to mediation.<sup>244</sup>

23 Having reached those conclusions, the court of appeals made clear that it was  
24 uncomfortable with its ruling precluding discovery of the mediation briefs and  
25 eve-of-mediation emails. Among other things, the court said:

26 The stringent result we reach here means that when clients ... participate in  
27 mediation they are, in effect, relinquishing all claims for new and independent  
28 torts arising from mediation, including legal malpractice causes of action against  
29 their own counsel. Certainly clients, who have a fiduciary relationship with their

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237. *Id.* at 148. In recognizing such an exception to the mediation confidentiality statutes, the trial judge relied on *Rinaker*, 62 Cal. App. 4th 155, which held that those statutes must yield when they conflict with a juvenile’s constitutional right of confrontation in a juvenile delinquency proceeding. On appeal, the *Wimsatt* court distinguished *Rinaker*, explaining that *Rinaker* involved vindication of constitutionally protected rights, whereas the case before it was “no different from the thousands of civil cases routinely resolved through mediation.” *Wimsatt*, 152 Cal. App. 4th at 162.

238. *Wimsatt*, 152 Cal. App. 4th at 149-58.

239. *Id.* at 158.

240. *Id.* at 159.

241. *Id.* at 149, 158-59.

242. *Id.* at 152.

243. *Id.* at 165.

244. *Id.* at 160.

1 lawyers, do not understand that this result is a by-product of an agreement to  
2 mediate. We believe that the purpose of mediation is not enhanced by such a  
3 result because wrongs will go unpunished and the administration of justice is not  
4 served.<sup>245</sup>

5 After referring to negative commentary and various cases involving California’s  
6 mediation confidentiality statutes, the court urged the Legislature to reconsider the  
7 statutory scheme:

8       Given the number of cases in which the fair and equitable administration of  
9 justice has been thwarted, perhaps it is time for the Legislature to reconsider  
10 California’s broad and expansive mediation confidentiality statutes and to craft  
11 ones that would permit countervailing public policies be considered.<sup>246</sup>

12 The *Wimsatt* court also suggested that given “the harsh and inequitable results of  
13 the mediation confidentiality statutes ... the parties and their attorneys should be  
14 warned of the unintended consequences of agreeing to mediate a dispute.”<sup>247</sup>

15       *Later developments.* After the court of appeals resolved the discovery dispute,  
16 the malpractice case returned to the trial court. The judge eventually granted a  
17 motion in limine precluding the client from introducing all evidence in his case-in-  
18 chief “because mediation confidentiality precluded the introduction of vital  
19 evidence.”<sup>248</sup> The trial court thus entered judgment against the client, who  
20 appealed.

21       The court of appeal affirmed the judgment in an unpublished decision,  
22 explaining that when it ruled on the discovery motion “the record lacked sufficient  
23 information” from which it could conclude that the statements allegedly lowering  
24 the settlement demand were linked to the mediation.”<sup>249</sup> In contrast, in the later  
25 appeal it was clear that the client would not be able to address issues regarding  
26 whether the settlement was appropriate because doing so “would require facts that  
27 are inextricably connected to the mediation and the settlement reached therein.”<sup>250</sup>

28       In reaching that decision, the court of appeal made clear that it was *not* holding  
29 that “*all* plaintiffs are foreclosed from pursuing all legal malpractice-related  
30 lawsuits when the client’s case is settled in mediation.”<sup>251</sup> Instead, said the court,  
31 the key “is whether the accusations can be proven *without delving into what*  
32 *occurred in the mediation* and without using any communication made ‘for the

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245. *Id.* at 163 (footnote omitted).

246. *Id.* at 163.

247. *Id.*

248. *Kausch v. Wimsatt*, 2009 Cal. App. Unpub. LEXIS 8566, at \*\*26.

249. *Id.* at \*17.

250. *Id.* at \*43-\*44.

251. *Id.* at \*42 n.12 (emphasis added).

1 purpose of, in the course of, or pursuant to, a mediation or mediation consultation  
2 ....”<sup>252</sup>

3 In circumstances like the ones before it, the court was “forced to conclude that  
4 an attorney is immunized from any negligent and intentional torts committed in  
5 mediation when said torts are the result of communications made for the purpose  
6 of, in the course of, or pursuant to a mediation, or a mediation consultation.”

7 ***Porter***

8 The history of the *Porter* litigation is long and complicated. To the best of the  
9 Commission’s knowledge, the matter still is not fully resolved. For present  
10 purposes, it seems sufficient to concentrate on certain events.<sup>253</sup>

11 In particular, *Porter* is a legal malpractice case in which the clients alleged that  
12 their attorney (1) gave them incorrect tax advice in the underlying case, (2) failed  
13 to reimburse them for certain payments they made to him before the underlying  
14 case settled, and (3) failed to pay one of the clients for services she rendered as a  
15 paralegal in the underlying case. The clients sued their attorney for legal  
16 malpractice, breach of fiduciary duty, constructive fraud, negligent  
17 misrepresentation, breach of the fee agreement, rescission, unjust enrichment, and  
18 liability for unpaid wages.<sup>254</sup>

19 The trial court sustained a demurrer to the clients’ malpractice claim because the  
20 clients admitted that they suffered no injury from their attorney’s allegedly  
21 incorrect tax advice.<sup>255</sup> The other claims proceeded to a jury trial, at which both  
22 sides testified about what occurred at a mediation in the underlying case. The jury  
23 found for the clients on some claims and for the attorney on other claims.

24 Shortly after the jury verdict, the California Supreme Court decided *Simmons*,  
25 holding that any waiver of mediation confidentiality must be express, not implied,  
26 and must either be written or orally memorialized in accordance with a statutory  
27 procedure.<sup>256</sup> Based on *Simmons*, the attorney defendant in *Porter* moved for a  
28 new trial, arguing that mediation evidence was improperly placed before the jury.  
29 The trial court agreed and vacated the judgment, but the clients appealed.

30 *Majority opinion.* In a split decision, the court of appeals reversed the order  
31 granting a new trial. The majority opinion distinguished between attorney-client  
32 discussions and other mediation communications:

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252. *Id.*, quoting Evid. Code § 1119 (emphasis added).

253. For a more detailed discussion of the *Porter* litigation, see CLRC Staff Memorandum 2015-4, pp. 6-12.

254. 107 Cal. Rptr. 3d at 658 (depublished opinion).

255. *Id.* at 658 n.7.

256. *Simmons* is further described in the discussion of “California Supreme Court Decisions on Mediation Confidentiality” *supra*.

1       The confidentiality aspect which protects and shrouds the mediation process  
2       should not be extended to protect anything other than a frank, candid and open  
3       exchange regarding events in the past by and between disputants. It was not meant  
4       to subsume a secondary and ancillary set of communications by and between a  
5       client and his own counsel, irrespective of whether such communications took  
6       place in the presence of the mediator or not.<sup>257</sup>

7       The majority explained that extending mediation confidentiality to attorney-  
8       client conversations would be inconsistent with Evidence Code Section 958,<sup>258</sup>  
9       which says there is no attorney-client privilege “as to a communication relevant to  
10      an issue of breach, by the lawyer or by the client, of a duty arising out of the  
11      lawyer-client relationship.” According to the majority, extending mediation  
12      confidentiality to the attorney-client relationship would render Section 958 a  
13      nullity, because then the “mediation process and its attendant confidentiality  
14      would trump the attorney-client privilege and preclude the waiver of it by the very  
15      holder of the privilege.”<sup>259</sup> The majority did not think the Legislature intended for  
16      “a well-established and recognized privilege and waiver process” to be “thwarted  
17      by a nonprivileged statutory scheme designed to protect a wholly different set of  
18      disputants.”<sup>260</sup>

19      In the majority’s view,

20           To expand the mediation privilege to also cover communications between a  
21           lawyer and his client would seriously impair and undermine not only the attorney-  
22           client relationship but would likewise create a chilling effect on the use of  
23           mediations. In fact, clients would be precluded from pursuing any remedy against  
24           their own counsel for professional deficiencies occurring during the mediation  
25           process as well as representations made to the client to induce settlement.<sup>261</sup>

26      The majority “decline[d] to extend the confidentiality component to a relationship  
27      neither envisioned nor contemplated by statute.”<sup>262</sup>

28      *Dissent.* In dissent, Justice Flier noted that the only reason the attorney-client  
29      discussion in question occurred was “because a mediation was taking place and  
30      efforts were being made to settle the case in this mediation.”<sup>263</sup> He therefore  
31      concluded that the discussion was “for the purpose of, in the course of, and  
32      pursuant to a mediation,” as contemplated by the key provision on mediation  
33      confidentiality.<sup>264</sup>

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257. *Porter*, 107 Cal. Rptr. at 662 (depublished opinion).

258. *Id.* at 661-62.

259. *Id.* at 661.

260. *Id.* at 661-62.

261. *Id.* at 662.

262. *Id.* at 665.

263. *Id.* at 665 (Flier, J., dissenting).

264. *Id.* at 666-67.



1 Justice Flier also pointed out that the majority opinion “sweepingly exempts all  
2 client-lawyer communications from mediation confidentiality.”<sup>265</sup> In his view, that  
3 approach was mistaken; instead, “such a drastic exception must be made by the  
4 Legislature under carefully crafted statutory standards.”<sup>266</sup>

5 *Review by the California Supreme Court.* After the court of appeal issued its  
6 decision, the attorney defendant petitioned the California Supreme Court for  
7 review. The Court granted review, but deferred briefing pending its consideration  
8 and disposition of *Cassel*.<sup>267</sup>

9 Upon deciding *Cassel* in 2011, the Court transferred the *Porter* case back to the  
10 court of appeal. The Court instructed the court of appeal to vacate its earlier  
11 decision and reconsider the cause in light of *Cassel*.<sup>268</sup> To the best of the  
12 Commission’s knowledge, the case has not yet been retried.

### 13 ***Other Lower Court Decisions***

14 *Cassel*, *Wimsatt*, and *Porter* are not the only judicial decisions that involve the  
15 intersection of California’s mediation confidentiality statutes and allegations of  
16 attorney misconduct. The Commission found two other published decisions<sup>269</sup> and  
17 six unpublished decisions<sup>270</sup> in which a court of appeal held that the mediation  
18 confidentiality statutes prevented a litigant from using mediation communications  
19 to support allegations that an attorney engaged in misconduct in the mediation

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265. *Id.* at 667.

266. *Id.*

267. See 2010 Cal. LEXIS 7269, 233 P.3d 1088, 111 Cal. Rptr. 3d 693 (2010).

268. See 2011 Cal. LEXIS 3636, 250 P.3d 180, 123 Cal. Rptr. 3d 577 (2011); see also 2011 Cal. LEXIS 10768 (2011).

269. See cases cited in notes 273 & 274 *infra*. In another published decision, a client alleged that his attorney wrongfully coerced him into entering into a mediated settlement agreement by threatening to withdraw on the eve of trial. The court of appeal ruled against the client on grounds unrelated to mediation confidentiality. See *Chan v. Lund*, 188 Cal. App. 4th 1159, 116 Cal. Rptr. 3d 122 (2011); see also *Chan v. Packard*, 2015 Cal. App. Unpub. LEXIS 6899 (2015).

270. See cases cited in notes 275-80 *infra*. In another unpublished decision, a client alleged that her attorneys committed malpractice in the course of a mediation that settled both an underlying tort case and a related workers’ compensation claim. The trial court sustained a demurrer with leave to amend; it entered judgment against the client when the client failed to amend. The court of appeal upheld that result, but did not resolve any mediation confidentiality issues because the client failed to supply an adequate record for review. *Spanos v. Dreyer*, 2016 Cal. App. Unpub. LEXIS 4752 (2016).

1 process.<sup>271</sup> The Commission also found an unpublished decision in which a federal  
2 district court reached a similar conclusion in a case under California law.<sup>272</sup>

3 Those decisions involved the following types of allegations, the merits of which  
4 are unclear:

- 5 • A party's claim that a mediated settlement agreement was unenforceable  
6 because the party's attorney, his opponent's attorney, and the mediator  
7 coerced him into signing it through threats of criminal prosecution.<sup>273</sup>
- 8 • A client's claim that his attorney failed to adequately advise him of the risks  
9 of the mediated settlement agreement, drafted that agreement and the  
10 judgment such that corporate obligations became his personal obligations,  
11 and breached a conflict waiver by failing to negotiate a settlement with  
12 certain terms.<sup>274</sup>
- 13 • A legal malpractice case in which the clients alleged that their attorneys  
14 tricked them into settling the underlying case by inducing them to sign a  
15 supposed confidentiality agreement at a mediation, and later appending the  
16 signature sheet to a settlement agreement.<sup>275</sup>
- 17 • A legal malpractice case in which the client alleged that his attorneys failed  
18 to prepare for trial, agreed to a dispute resolution process (mediation-  
19 arbitration) that disfavored him, agreed to an unreasonable settlement, and  
20 negligently allowed defaults of other defendants to be taken, leaving him  
21 exposed as the only defendant.<sup>276</sup>
- 22 • A legal malpractice case in which the client alleged that his attorneys failed  
23 to inform him that (1) he would be personally liable under a mediated  
24 settlement agreement and (2) he should obtain separate counsel before  
25 signing the agreement.<sup>277</sup>
- 26 • A legal malpractice case in which the client alleged that his attorneys failed  
27 to include a general statement of release from his wife in a mediated

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271. These totals do not include cases involving an alleged failure to comply with a court order to mediate. For discussion of cases in that category, see CLRC Staff Memorandum 2015-4, pp. 28-31. See also *supra* note 22 (describing different types of noncompliance with a court order to mediate) and the description of *Foxgate* in the discussion of "California Supreme Court Decisions on Mediation Confidentiality" *supra*.

272. See *Benesch v. Green*, 2009 U.S. Dist. LEXIS 117641 (2009).

273. See *Provost v. Regents of the University of California*, 201 Cal. App. 4th 1289, 135 Cal. Rptr. 3d 591 (2011). For further discussion of this case, see CLRC Staff Memorandum 2015-4, p. 14.

274. See *Amis v. Greenberg Traurig LLP*, 235 Cal. App. 4th 331, 185 Cal. Rptr. 3d 322 (2015). For further discussion of this case, see CLRC Staff Memorandum 2015-4, pp. 15-16.

275. See *Hadley v. The Cochran Firm*, 2012 Cal. App. Unpub. LEXIS 5743 (2012).

276. See *Mellor v. Oaks*, 2011 Cal. App. Unpub. LEXIS 8797 (2011). Apparently, the client sought to prove these allegations solely through mediation communications. The trial court granted a nonsuit and the court of appeal affirmed, explaining that mediation communications were inadmissible and thus there was a "paucity of evidence" that the client could present. *Id.* at \*12.

277. See *Gossett v. St. John*, 2011 Cal. App. Unpub. LEXIS 3586 (2011).

settlement agreement and failed to obtain his new spouse’s consent to the settlement.<sup>278</sup>

- A legal malpractice case in which the client alleged that his attorney made numerous misrepresentations to him, neglected to show him working drafts of a mediated settlement agreement in the underlying case, failed to explain certain things, neglected to take certain steps, and failed to advise the client to seek expert tax advice.<sup>279</sup>
- A legal malpractice case in which a creditor alleged that its attorneys negligently caused it to enter into a mediated settlement agreement for far less than the full amount of the debt.<sup>280</sup>
- A legal malpractice case in which the client alleged that during a mediation her attorney induced her to sign a settlement term sheet that failed to meet her goal of protecting her daughter’s inheritance rights.<sup>281</sup>

The Commission also found two decisions (a published decision by a federal district court and an unpublished opinion by a superior court) in which evidence of mediation communications was used in resolving whether an attorney engaged in misconduct. In both cases, the court determined that the misconduct allegations were meritless.<sup>282</sup>

In contrast, in a state bar disciplinary proceeding a client alleged (among other things) that during a mediation her lawyer agreed to reduce his fee, yet he later reneged. Relying on *Cassel*, the Hearing Department ruled that “mediation

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278. See *In re Malcolm*, 2004 Cal. App. Unpub. LEXIS 10675 (2004). The court of appeals made clear that although the client could not use mediation communications to support his allegations, he was still “free to prosecute his malpractice action ... using the property settlement and other nonconfidential evidence.” *Id.* at \*12.

279. See *Biller v. Faber*, 2016 Cal. App. Unpub. LEXIS 3017 (2016).

280. See *Shaozing City Maolong Wuzhong Down Products, Ltd. v. Landsberg & Associates*, 2015 Cal. App. Unpub. LEXIS 4492 (2015).

281. See *Benesch*, 2009 U.S. Dist. LEXIS 117641. The plaintiff argued that California’s mediation confidentiality statutes do not encompass attorney-client communications. The federal district court disagreed, concluding that “[c]ommunications between counsel and client that are materially related to the mediation, even if they are not made to another party or the mediator, are ‘for the purpose of’ or ‘pursuant to’ mediation” within the meaning of the California statutes. *Id.* at \*22. The district court nonetheless denied the summary judgment motion without prejudice, because the plaintiff had not yet had an opportunity to explore “the question of what evidence would be left after application of the mediation confidentiality statutes ....” *Id.* at \*25.

*Benesch* preceded the California Supreme Court’s decision in *Cassel*. The California Supreme Court described *Benesch* carefully in its *Cassel* opinion, see 51 Cal. 4th at 134-35, and expressly stated that it “agreed with” the district judge’s analysis regarding mediation-related attorney-client communications, 51 Cal. 4th at 135.

282. See *Olam*, 68 F. Supp. 2d at 1151 (party sought to avoid obligations under mediated settlement agreement by alleging she was subjected to undue influence; court considered mediator’s testimony and concluded there was “no evidence that [party] was subjected to anything remotely close to undue pressure”); *Conwell v. Mallen*, 2015 Cal. Super. LEXIS 11140 (2015) (client sought to avoid mediated settlement by blaming his attorneys; court considered evidence of mediation proceedings in resolving malpractice claim and ultimately granted judgment against client).

1 confidentiality applied to preclude the discussion and the exact terms of the  
2 modification.”<sup>283</sup> At the same time, however, it did consider evidence that there  
3 was a modification (the attorney admitted as much) and that the attorney  
4 subsequently took certain settlement funds for himself because he did not think the  
5 modification was valid.<sup>284</sup> That was sufficient for the Hearing Department to  
6 determine that the attorney had wrongfully failed to maintain disputed funds in  
7 trust, a ruling which was upheld on appeal.<sup>285</sup> The merits of the attorney’s  
8 challenge to the validity of the modification are not clear to the Commission, but a  
9 legal malpractice case involving the same facts settled and the client “testified that  
10 she was ‘made whole.’”<sup>286</sup>

11 In addition to the various published and unpublished cases described above, the  
12 Commission has received comments indicating that there are other disputes  
13 involving alleged attorney misconduct in the mediation process. It appears that due  
14 to *Cassel*, not all such disputes proceed to litigation.<sup>287</sup>

#### 15 Law of Other Jurisdictions

16 The legislative resolution requesting this study directs the Commission to  
17 consider the law in other jurisdictions, including the Uniform Mediation Act  
18 (“UMA”). The Commission did extensive research in response to that request. Its  
19 findings on the topic are summarized below, in the following order:

- 20 (1) Uniform Mediation Act.
- 21 (2) Other states.
- 22 (3) Federal law.

#### 23 Uniform Mediation Act

24 Drafting of the UMA began soon after California enacted its current statutory  
25 scheme governing protection of mediation communications. The project was

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283. *In re Bolanos*, Case No. 12-O-12167-PEM (Hearing Dep’t of State Bar Ct. filed Sept. 16, 2013), n.7.

284. *Id.*

285. See *In re Bolanos*, Case No. 12-O-12167 (Review Dep’t of State Bar Ct., filed May 18, 2015), pp. 4-6, 8 (available at <http://www.statebarcourt.ca.gov/Portals/2/documents/opinions/Bolanos.pdf>).

286. See *id.* at 7.

287. See, e.g., First Supplement to CLRC Staff Memorandum 15-46, Exhibit p. 52 (comments of Robert Sall) (“Many times since the *Cassel* decision in 2011, I have had to inform prospective clients that they would most likely be unable to prove [an] otherwise viable claim due to the impact of mediation confidentiality.”); Memorandum 2015-36, Exhibit pp. 2-7 (comments of Gwire Law Firm) (“[W]e have had to decline too many compelling malpractice and fiduciary breach claims on the sole basis that the wrongdoing occurred during mediation. Indeed, turning away clients who have otherwise viable cases based on attorney negligence and false representations because the law has tied our (and their) hands is one of the most tragic and morally wrong things we face in our practice.”); see also First Supplement to Memorandum 2014-27, Exhibit pp. 1-2 (comments of Howard Fields).

1 prompted by the rising popularity of mediation across the country.<sup>288</sup> Experts in  
2 the area felt the time was ripe to assess which mediation approaches worked best,  
3 prepare legislation based on them, and attempt to attain a degree of nationwide  
4 uniformity.<sup>289</sup>

5 ***Drafting Process***

6 The UMA was drafted over a period of four years, through collaboration  
7 between (1) a drafting committee of the National Conference of Commissioners  
8 on Uniform State Laws (“NCCUSL,” now known as the “Uniform Law  
9 Commission” or “ULC”) and (2) a drafting committee sponsored by the American  
10 Bar Association (“ABA”), working through its Section of Dispute Resolution.<sup>290</sup>  
11 Although both organizations had a long history of working to improve the law,  
12 this was the first time they participated jointly in drafting proposed legislation for  
13 state consideration.<sup>291</sup>

14 With the assistance of a grant from the William and Flora Hewlett Foundation,  
15 the drafting committees had academic support from many mediation scholars.<sup>292</sup>  
16 Numerous bar groups, mediators, and organizations of mediation professionals  
17 also participated in the drafting process. According to one of the reporters for the  
18 project, drafting the UMA “was an intense national dialogue on the mediation  
19 process — the nature of the process, its goals and values, its practices and  
20 experience, and its relationship to law — on a scale that the field of mediation had  
21 never before engaged so publicly.”<sup>293</sup>

22 NCCUSL approved the UMA in the summer of 2001, and the ABA approved it  
23 six months later.<sup>294</sup> According to the ULC’s website, the UMA has been endorsed  
24 by the American Arbitration Association (“AAA”), the Judicial Arbitration and  
25 Mediation Service (“JAMS”), the CPR Institute for Dispute Resolution, and the  
26 National Arbitration Forum.<sup>295</sup>

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288. See UMA, *supra* note 5, Prefatory Note at introduction.

289. See UMA, *supra* note 5, Prefatory Note at #4 (ripeness of uniform law).

290. See UMA, *supra* note 5, Prefatory Note at #5 (product of consensual process).

291. Richard Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. Disp. Resol. 99, 103 (2003). “The leadership of both organizations agreed to share resources, meet together, and work collaboratively but independently” in drafting the UMA. *Id.*

292. See UMA, *supra* note 5, Prefatory Note at #5 (product of consensual process).

293. Reuben, *supra* note 291, at 106.

294. In 2003, the UMA was amended to address international commercial mediation.

295. See <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Mediation%20Act>.

## Objectives

The Prefatory Note to the UMA explains the objectives of the legislation. A key objective was to promote uniformity in treatment of mediation issues across the country.<sup>296</sup> In addition, the drafters sought to:

- promote candor of parties through confidentiality of the mediation process, subject only to the need for disclosure to accommodate specific and compelling societal interests ...;
- encourage the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with principles of integrity of the mediation process, active party involvement, and informed self-determination by the parties ...; and
- advance the policy that the decision-making authority in the mediation process rests with the parties.<sup>297</sup>

## General Structure

A “central thrust” of the UMA is on protection of mediation communications.<sup>298</sup> According to the drafters, mediation involves a frank exchange of information and ideas that “can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.”<sup>299</sup> The drafters also specifically observed that “public confidence in and the voluntary use of mediation can be expected to expand if people have confidence that the mediator will not take sides or disclose their statements ....”<sup>300</sup>

While emphasizing the importance of protecting mediation communications, the drafters did not consider it necessary to enact a statute making such communications “confidential” in the true sense of that word.<sup>301</sup> Rather, they concluded that a statute was needed only to restrict the admissibility or disclosure of evidence in judicial and other legal proceedings.<sup>302</sup>

The key provisions of the UMA protecting mediation communications are subdivisions (a) and (b) of Section 4, which provide:

296. UMA, *supra* note 5, Prefatory Note at introduction.

297. *Id.* For further discussion of those objectives, see *id.*

298. *Id.* The UMA also addresses a few other aspects of mediation. See UMA §§ 9 (mediator’s disclosure of conflicts of interest; background), 10 (participation in mediation).

299. UMA, *supra* note 5, Prefatory Note at #1 (promoting candor).

300. *Id.*

301. *Id.* For the most part, the matter of confidentiality was left up to the parties to decide. See UMA § 8 (unless mediation is subject to open meetings act or open records act, “mediation communications are confidential to the extent agreed by the parties or provided by other law or rule” of enacting state).

302. UMA, *supra* note 5, Prefatory Note at #1 (promoting candor). According to the drafters, “the major contribution of the Act is to provide a privilege in legal proceedings, where it would otherwise either not be available or would not be available in a uniform way across the States.” *Id.*

(a) Except as otherwise provided in Section 6, a *mediation communication* is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by Section 5.

(b) In a proceeding, the following privileges apply:

(1) A *mediation party* may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A *mediator* may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A *nonparty participant* may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.<sup>303</sup>

These provisions establish “a privilege for mediation communications that, like other communications privileges, allows a person to refuse to disclose and to prevent other people from disclosing particular communications.”<sup>304</sup>

That privilege applies in any “proceeding,” which is defined broadly enough to include both civil and criminal matters.<sup>305</sup> In contrast, California’s key statute protecting mediation communications applies only in noncriminal proceedings.

Under subdivision (b) of UMA Section 4, every mediation participant is a “holder” of the privilege — i.e., a “person who is eligible to raise and waive the privilege.”<sup>306</sup> Unlike California law, however, all mediation participants are not treated equally.

Rather, subdivision (b) distinguishes between a “mediation party,”<sup>307</sup> a “mediator,”<sup>308</sup> and a “nonparty participant.”<sup>309</sup> A mediation party receives more protection than a mediator, and a mediator receives more protection than a nonparty participant.<sup>310</sup>

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303. Emphasis added.

The UMA also includes a provision that prohibits a mediator from making, and prohibits a court, administrative agency, or arbitrator from considering, “a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.” UMA § 7(a), (c). Evidence Code Section 1121 served as a model in drafting this UMA provision, but differs from it in some respects (see UMA §§ 7(b)(2), (3), which lack California counterparts).

304. UMA § 4 Comment. In classifying its protection as a “privilege,” the drafters of the UMA deliberately chose not to follow certain other approaches (e.g., creating a categorical, policy-based exclusion as in California). For explanation of that decision, see UMA § 4 Comment.

305. See UMA § 2(7) & Comment.

306. UMA § 4(b) & Comment.

307. A mediation party is “a person that participates in a mediation and whose agreement is necessary to resolve the dispute.” UMA § 2(5).

308. A mediator is “an individual who conducts a mediation.” UMA § 2(3).

309. A nonparty participant is “a person, other than a party or mediator, that participates in a mediation.” UMA § 2(4).

310. The UMA drafters explained:

In the drafters' view, giving mediation parties the greatest control over the use of mediation communications protects the expectations "of those persons whose candor is most important to the success of the mediation process."<sup>311</sup> The drafters also believed, however, that mediators should be holders with respect to their own mediation communications, "so that they may participate candidly, and with respect to their own testimony, so that they will not be viewed as biased in future mediations ...."<sup>312</sup> Similarly, the drafters provided a limited privilege for a nonparty participant to "encourage the candid participation of experts and others who may have information that would facilitate resolution of the case."<sup>313</sup>

#### ***Waiver of the Protection Against Admissibility and Disclosure***

The UMA privilege for mediation communications can be expressly waived. Unlike California, where an express waiver requires assent of *all* mediation participants, the requirements for an express waiver under the UMA depend on whose mediation communication is at stake and who is being asked to testify.<sup>314</sup>

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As with other privileges, a mediation privilege operates to allow a person to refuse to disclose and to prevent another from disclosing particular communications.

.... [P]arties have the greatest blocking power and may block provision of testimony about or other evidence of mediation communications *made by anyone* in the mediation, including persons other than the mediator and parties....

Mediators may block *their own provision of evidence*, including their own testimony and evidence provided by anyone else of the mediator's mediation communications, even if the parties consent....

Finally a *nonparty participant* may block evidence of *that individual's mediation communication* regardless of who provides the evidence and whether the parties or mediator consent.

UMA § 4(b) Comment (citation omitted) (emphasis added).

The UMA's complexity on this and other points has been the subject of debate. Some sources have contended that it is overly complex, difficult to explain, and may chill mediation communications. See, e.g., Brian Shannon, *Dancing With the One That "Brung Us" — Why the Texas ADR Community Has Declined to Embrace the UMA*, 2003 J. Disp. Resol. 197, 220 (2003) ("The UMA's backwards approach to confidentiality as well as its maze of privileges, waivers, and exceptions are not an adequate substitute for the current Texas approach"); see also *id.* at 197-200; N.Y. State Bar Ass'n Committee on ADR, *The Uniform Mediation Act and Mediation in New York* 10 (Nov. 1, 2002), available at [http://websearch.nysba.org/search?rm\\_timestamp=1409183470826&SEARCH\\_query=uniform+mediation+act&FUNCTION=SEARCH&&SELECTEDSERVER=documents&VIEW=summary](http://websearch.nysba.org/search?rm_timestamp=1409183470826&SEARCH_query=uniform+mediation+act&FUNCTION=SEARCH&&SELECTEDSERVER=documents&VIEW=summary); "Uniform Mediation Act video," available at [http://open.mitchellhamline.edu/dri\\_mclvideo/40/](http://open.mitchellhamline.edu/dri_mclvideo/40/). Other sources have defended the UMA as a precise balancing of competing interests. See, e.g., Reuben, *supra* note 291, at 109; Maureen Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 Harv. Negotiation L. Rev. 29, 52 (2003) ("The UMA's approach in establishing a mediation privilege while enumerating certain exceptions reflects a thoughtful a priori weighing of competing policies between confidentiality and the need for disclosure.").

311. *Id.*

312. *Id.*

313. *Id.*

314. The UMA rules are:

- For testimony about mediation communications made by a party, all parties are the holders and therefore all parties must waive the privilege before a party or nonparty participant may testify or



1 The UMA privilege can also be waived in several other ways.<sup>315</sup> California has  
2 no comparable waiver provisions; any waiver of California’s mediation  
3 confidentiality protection must be express.<sup>316</sup>

4 ***UMA Exceptions Generally***

5 The UMA drafters believed that the statutory protection for mediation  
6 communications should not be absolute. They explained:

7 As with other privileges, the mediation privilege must have limits, and nearly  
8 all existing state mediation statutes provide them. Definitions and exceptions  
9 primarily are necessary to give appropriate weight to other valid justice system  
10 values .... They often apply to situations that arise only rarely, but might produce  
11 grave injustice in that unusual case if not excepted from the privilege.<sup>317</sup>

12 In the opinion of the drafters, “these exceptions need not significantly hamper  
13 candor.”<sup>318</sup>

14 They decided to include ten different exceptions in the UMA.<sup>319</sup> Two of those  
15 exceptions are similar to ones that exist in California: an exception for preexisting  
16 evidence that is used in a mediation<sup>320</sup> and an exception for a fully executed  
17 agreement reached in a mediation.<sup>321</sup> Another UMA exception applies only when

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provide evidence; if that testimony is to be provided by a mediator, all parties and the mediator must waive the privilege.

- For testimony about mediation communications made by the mediator, both the parties and the mediator are holders of the privilege, and therefore both the parties and the mediator must waive the privilege before a party, mediator, or nonparty participant may testify or provide evidence of a mediator’s mediation communications.

- For testimony about mediation communications that are made by a nonparty participant, both the parties and the nonparty participants are holders of the privilege and therefore both the parties and the nonparty participant must waive before a party or nonparty participant may testify; if that testimony is to be offered through the mediator, the mediator must also waive.

UMA § 5(a) & (b) Comment; see UMA § 4(b)(2) (“mediator may refuse to disclose a mediation communication”); UMA § 5(a) (express waiver requirements).

315. Waiver under the UMA occurs when:

- A person discloses or makes a representation about a mediation communication and that action prejudices another person in a proceeding. UMA § 5(b).
- A person intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity. UMA § 5(c).
- A mediator fails to comply with the UMA disclosure requirements or its impartiality requirement. UMA § 9(d) & Comment.

316. See *Simmons*, 44 Cal. 4th at 588.

317. UMA, *supra* note 5, Prefatory Note at #1 (promoting candor).

318. *Id.*

319. See UMA §§ 4(c), 6. The UMA is also subject to certain limits on its coverage and scope. See UMA §§ 2(2), 3(b)-(c); see also CLRC Staff Memorandum 2014-14, pp. 24-25 (discussing UMA §§ 2(2), 3(b)-(c)).

320. See UMA § 4(c) & Comment.

321. See UMA § 6(a)(1) & Comment.

1 mediation communications are proffered as evidence in a criminal case, which is  
2 beyond the scope of California’s mediation confidentiality law.<sup>322</sup>

3 The remaining seven UMA exceptions have no clear counterpart under  
4 California law. Of those, a few seem particularly pertinent to this study, as  
5 explained next.<sup>323</sup>

6 ***UMA Exceptions for Professional Misconduct and Mediator Misconduct***

7 UMA Section 6(a)(6) directly addresses the intersection of mediation  
8 confidentiality and professional misconduct. It creates the following exception to  
9 the UMA privilege:

10 (a) There is no privilege under Section 4 for a mediation communication that is:

11 ....

12 (6) except as otherwise provided in subsection (c), sought or offered to prove or  
13 disprove a claim or complaint of professional misconduct or malpractice filed  
14 against a mediation party, nonparty participant, or representative of a party based  
15 on conduct occurring during a mediation....

16 Notably, this exception is not limited to evidence that *an attorney* engaged in  
17 legal malpractice or other professional misconduct. The exception also  
18 encompasses other types of professional misconduct, such as evidence that a  
19 mediation party, nonparty participant, or representative of a party engaged in  
20 medical malpractice or accounting malpractice.

21 By its terms, the professional misconduct exception includes both evidence  
22 tending to *prove* a claim of professional malpractice, and evidence tending to  
23 *disprove* such a claim. Importantly, however, a significant constraint exists with  
24 regard to establishing whether professional misconduct actually occurred: In such

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322. See UMA § 6(b)(1) & Comment. The UMA provides two alternative versions of this exception. See *id.* & UMA § 6(b)(1) Comment.

323. The other exceptions with no California counterpart are:

(1) An exception for a mediation communication that is available to the public under an open records act, or is made during a mediation session that is open to the public, or required by law to be open to the public. See UMA § 6(a)(2) & Comment.

(2) An exception for “a threat or statement of a plan to inflict bodily injury or commit a crime of violence.” UMA § 6(a)(3).

(3) An exception for a mediation statement that is “intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity. UMA § 6(a)(4).

(4) An exception for a mediation communication that is “sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party ....” UMA § 6(a)(7). The UMA provides two alternative versions of this exception. See *id.* & UMA § 6(a)(7) Comment.

1 an inquiry, a mediator cannot be compelled to provide evidence of a mediation  
2 communication.<sup>324</sup>

3 Further, the professional misconduct exception is restricted to evidence of  
4 misconduct that allegedly occurred “during a mediation.”<sup>325</sup> Thus, the exception  
5 would not apply to evidence of alleged misconduct in a non-mediation setting.

6 The drafters of the UMA gave the following reasons for their approach to  
7 professional misconduct:

8 Sometimes the issue arises whether anyone may provide evidence of  
9 professional misconduct or malpractice occurring during the mediation. The  
10 failure to provide an exception for such evidence would mean that lawyers and  
11 fiduciaries could act unethically or in violation of standards without concern that  
12 evidence of the misconduct would later be admissible in a proceeding brought for  
13 recourse. This exception makes it possible to use testimony of anyone except the  
14 mediator in proceedings at which such a claim is made or defended. Because of  
15 the potential adverse impact on a mediator’s appearance of impartiality, the use of  
16 mediator testimony is more guarded, and therefore protected by Section 6(c). It is  
17 important to note that evidence fitting this exception would still be protected in  
18 other types of proceedings, such as those related to the dispute being mediated.<sup>326</sup>

19 They included a separate UMA exception for mediator misconduct, which is  
20 similar to the one for professional misconduct but without the restriction on  
21 mediator testimony.<sup>327</sup>

22 ***UMA Exception Relating to the Validity and Enforceability of a Mediated Settlement***  
23 ***Agreement***

24 Another noteworthy exception is UMA Section 6(b)(2), which applies when a  
25 mediation party challenges the validity of a mediated settlement agreement, as  
26 happened in some of the cases that prompted this study. According to the UMA  
27 drafters, this exception is “designed to preserve traditional contract defenses to the  
28 enforcement of the mediated settlement agreement that relate to the integrity of the  
29 mediation process, which otherwise would be unavailable if based on mediation  
30 communications.”<sup>328</sup>

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324. See UMA §§ 6(a)(6), (c). Although the mediator cannot be compelled to testify under UMA Section 6(a)(6), the mediator may testify voluntarily. See UMA §6(c) Comment. In contrast, California law provides that a mediator is generally incompetent to testify about a mediation. See Evid. Code § 703.5.

325. UMA § 6(a)(6).

326. UMA § 6(a)(6) Comment (citations omitted).

327. See UMA § 6(a)(5) & Comment.

328. UMA § 6(b)(2) Comment. The drafters further explained:

A recent Texas case provides an example [of when this exception should apply]. An action was brought to enforce a mediated settlement. The defendant raised the defense of duress and sought to introduce evidence that he had asked the mediator to permit him to leave because of chest pains and a history of heart trouble, and that the mediator had refused to let him leave the mediation session. The exception might also allow party testimony in a personal injury case that the driver denied

The exception does not apply every time there is a challenge to a mediated settlement agreement. Rather, it applies only if the proponent of the evidence convinces a judge, at an *in camera* proceeding, “that the evidence is unavailable, and the need for the evidence outweighs the policies underlying the privilege.”<sup>329</sup>

If the proponent of the evidence provides the required proof of necessity, the evidence may be used in the proceeding to rescind or reform or otherwise avoid liability on a mediated settlement agreement, regardless of whether the evidence tends to support or refute the effort to avoid such liability. The mediator cannot be forced to testify in the proceeding, only the other mediation participants. The UMA drafters imposed this limitation “to protect against frequent attempts to use the mediator as a tie-breaking witness, which would undermine the integrity of the mediation process and the impartiality of the individual mediator.”<sup>330</sup>

### ***Implementation of the UMA***

The UMA has been enacted in the District of Columbia and eleven states: Hawaii, Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington.<sup>331</sup> Efforts to enact the UMA in a number of other states

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having insurance, causing the plaintiff to rely and settle on that basis, where such a misstatement would be a basis for reforming or avoiding liability under the settlement.

*Id.* (citation omitted).

California has no comparable exception to its key provision protecting mediation communications. However, a mediated settlement agreement may be introduced “to show fraud, duress, or illegality that is relevant to an issue in dispute.” Evid. Code § 1123(d). The concept is that if a mediation party enters into a settlement agreement in reliance on a statement made during the mediation, that party can protect itself by incorporating the statement into the terms of the settlement agreement. That concept is relevant to the UMA example involving the uninsured driver.

In the duress scenario in which the mediator allegedly refused to let a party leave even though the party had chest pains, California’s statute would preclude introduction of any statements made during the mediation, but would not bar evidence of the mediator’s conduct or the party’s physical condition. See cases cited in note 164 *supra*.

329. UMA Section 6 (b)(2) provides:

(b) There is no privilege under Section 4 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

....

(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

330. UMA § 6(c) Comment.

331. D.C. Code §§ 16-4201 to 16-4213; Haw. Rev. Stat. §§ 658H-1 to 658H-13; Idaho Code Ann. §§ 9-801 to 9-814; Idaho R. Evid. 507; 710 Ill. Comp. Stat. 35/1 to 35/99; Iowa Code §§ 679C.101 to 679C.115; Neb. Rev. Stat. §§ 25-2930 to 25-2542; N.J. Rev. Stat. §§ 2A:23C-1 to 2A:23C-13; N.J. R. Ct. 1:40-4; Ohio Rev. Code Ann. §§ 2710.01 to 2710.10; S.D. Codified Laws §§ 19-13A-1 to 19-13A-15; Utah Code Ann. §§ 78B-10-101 to 78B-10-114; Vt. Stat. Ann. tit. 12, §§ 5711 to 5723; Wash. Rev. Code §§ 7.07.010 to 7.07.904.

1 have been unsuccessful;<sup>332</sup> UMA legislation is currently pending in New York and  
2 Massachusetts despite previous defeats in those jurisdictions.<sup>333</sup>

3 Nebraska was the first state to implement the UMA. Its version became  
4 operative in August 2003. By the end of 2006, the UMA was also enacted in the  
5 District of Columbia, Illinois, Iowa, New Jersey, Ohio, Utah, Vermont, and  
6 Washington. South Dakota's version of the UMA became operative in 2008, as  
7 did Idaho's version. Hawaii just enacted the UMA in 2013.

8 As best the Commission has been able to determine, none of the UMA  
9 jurisdictions afforded absolute or near-absolute protection to mediation  
10 communications before enacting the UMA. Instead, at the time of enacting the  
11 UMA, these jurisdictions appear to have afforded less protection for mediation  
12 communications than the UMA, or at least to have had a less well-developed body  
13 of law on the subject than the UMA.<sup>334</sup>

14 In general, the UMA enactments stick pretty close to the uniform text.<sup>335</sup> It is too  
15 early to tell how much variation there will be in interpreting the UMA protections  
16 from state to state.<sup>336</sup>

17 So far, every UMA jurisdiction has enacted the professional misconduct  
18 exception<sup>337</sup> without deviating from the uniform text.<sup>338</sup> The Commission found  
19 only one case squarely involving application of that exception: A recent Nebraska  
20 legal malpractice case in which a client alleged that at a mediation, her attorney  
21 negligently advised her to settle for less than her case was worth and coerced her

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According to the U.S. Census Bureau, the combined population of the UMA jurisdictions in 2016 was about 54 million people, which was approximately 16.7% of the country's total population. In comparison, California was the most populous state, with about 39 million people or approximately 12.1% of the total population. See <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

332. See CLRC Staff Memorandum 2014-35, pp. 30-32 (Massachusetts), 36-39 (New York) & Exhibit pp. 10 (Connecticut), 17 (Maine), 26 (New Hampshire), 36 (South Carolina); see also CLRC Staff Memorandum 2014-44, p. 25 ("The UMA received some attention in Texas, but the legal and mediation community appears to prefer the existing Texas approach. To the [CLRC staff's] knowledge, the UMA has not been introduced in the Texas Legislature at any time."); *id.* at 18-25 (describing Texas reaction to UMA in detail); CLRC Staff Memorandum 2014-43, pp. 4-6 ("[T]he UMA encountered resistance in Pennsylvania .... Although that opposition was apparently withdrawn for purposes of the ABA vote, [CLRC staff] did not find any current or past legislation seeking to enact the UMA in Pennsylvania"); CLRC Staff Memorandum 2014-35, p. 20 ("Minnesota's legal community participated in the drafting of the UMA.... But Minnesota has not enacted the uniform act.").

333. See HB 49 (Massachusetts); SB 1017 (Comrie) (New York).

334. That finding is consistent with a communication from the ULC on the same point. See First Supplement to CLRC Staff Memorandum 2014-14, Exhibit p. 1 (comments of Casey Gillice on behalf of ULC).

335. See CLRC Staff Memorandum 2014-24, pp. 4-5.

336. See *id.* at 6-7.

337. UMA § 6(a)(6), (c).

338. CLRC Staff Memorandum 2014-24, Exhibit pp. 7-8 & sources cited therein.

by threatening to stop advancing litigation costs if she did not settle.<sup>339</sup> The trial court granted summary judgment to the attorney, but the appellate court reversed and remanded, concluding that neither side was entitled to summary judgment. The appellate court further concluded that the mediator's deposition testimony would be admissible on remand, pursuant to Nebraska's version of UMA Section 6(a)(6).<sup>340</sup>

Every UMA jurisdiction but one has enacted the mediator misconduct exception<sup>341</sup> without deviating from the uniform text; the revisions made by the remaining jurisdiction do not appear significant.<sup>342</sup> There does not yet appear to be any case law interpreting this exception.

Three UMA states deviated from the uniform text<sup>343</sup> in enacting the exception relating to the validity of a mediated settlement agreement.<sup>344</sup> A few written decisions<sup>345</sup> discuss that exception to some extent.<sup>346</sup>

#### Other States

Like the eleven UMA states, virtually all of the remaining states provide some significant, statewide protection for mediation communications generally.<sup>347</sup> Kentucky,<sup>348</sup> New York,<sup>349</sup> and Tennessee<sup>350</sup> appear to be the only exceptions.

339. *Shriner v. Friedman Law Offices, P.C., L.L.O.*, 23 Neb. App. 869, 877 N.W.2d 272 (Neb. Ct. App. 2016).

The Commission also found an unpublished decision by a federal district court in New Mexico, which referred to UMA Section 6(a)(6) in concluding that a similar New Mexico provision applies to alleged misconduct by an insurer, not just alleged misconduct by an attorney. See *Willis v. Geico General Ins. Co.*, 2016 U.S. Dist. LEXIS 49038, at \*23 (April 2016).

340. See *id.* at 290-91. A mediator cannot be compelled to testify under UMA Section 6(a)(6), but the mediator may testify voluntarily. See UMA §6(c) & Comment. Presumably, that is what happened in *Shriner*. For further discussion of *Shriner*, see CLRC Staff Memorandum 2016-30, pp. 12-14.

341. UMA § 6(a)(5).

342. See CLRC Staff Memorandum 2014-24, Exhibit pp. 7-8 & sources cited therein.

343. See *id.*

344. UMA § 6(b)(2).

345. See, e.g., *Addessa v. Addessa*, 392 N.J. Super. 58, 66, 919 A.2d 885 (N.J. Super. Ct. App. Div. 2007); *City of Akron v. Carter*, 190 Ohio App. 3d 420, 942 N.E.2d 409 (Ohio Ct. App. 2010).

346. For further information on the UMA and its implementation, see CLRC Staff Memoranda 2014-14 & 2014-24.

347. Ala. Civ. Ct. Mediation R. 11 & Ala. App. Ct. Mediation R.8 (Alabama); Alaska R. Civ. Proc. 100(g) & Alaska R. Evid. 408 (Alaska); Ariz. Rev. Stat. § 12-2238 (Arizona); Ark. Code Ann. § 16-7-206 (Arkansas); Colo. Rev. Stat. § 13-22-307 & Colo. Rev. Stat. §§ 301 *et seq.* (Colorado); Conn. Gen. Stat. § 52-235d (Connecticut); Del. Super. Ct. Civ. R. 16(b)(4)(d) (for compulsory mediation in Superior Court), Del. Ch. Ct. R. 174 (for mediation resulting from a referral by the Chancellor or a Vice Chancellor) & 6 Del. Code § 7716 (confidentiality under Voluntary ADR Act) (Delaware); Fla. Stat. §§ 44.401 to 44.406 (Florida); Ga. ADR R. VII & Ga. ADR Appendix C (Georgia); Ind. ADR R. 2.11 & Ind. Code Ann. § 4-21.5-3.5-27 (Indiana); Kan. Stat. Ann. § 60-452a (in Kan. Rules of Evidence), Kan. Stat. Ann. § 5-512 (in Kan. Dispute Resolution Act) & Kan. Sup. Ct. R. 903 (Ethical Standards for Mediators) (Kansas); La. Rev. Stat. § 9:4112 (Louisiana); Maine R. Civ. Proc. 16B(k) & Maine R. Evid. 408(b), 514 (Maine); Md. Code,

1 ***Statutes and Rules***

2 The statutes and rules protecting mediation communications vary widely from  
3 state to state.<sup>351</sup> Among other things, they differ in whether, and to what extent,  
4 they permit the use of mediation communications in resolving an allegation of  
5 attorney misconduct.

6 In seven states (plus the UMA states), a statute or rule protecting mediation  
7 communications has one or more exceptions that expressly addresses alleged  
8 attorney misconduct or alleged professional misconduct more generally (thus  
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Courts & Judicial Proceedings §§ 3-1801 to 3-1806 & Md. R. 17-105 (Maryland); Mass. Gen. Laws ch. 233, § 23C (Massachusetts); Mich. Ct. R. 2.412 (Michigan); Minn. Gen. R. Prac. 114.08 & Comment (applicable to ADR proceedings, which are required by Minn. Gen. R. Prac. 114.01 in almost all civil cases), Minn. Stat. § 572.36 & Minn. Stat. § 595.02, Subd. 1(m), Subd. 1a (Minnesota); R. VII & XV(E) of the Miss. Court Annexed Mediation Rules for Civil Litigation (Mississippi); Mo. Rev. Stat. § 435.014 & Mo. S.Ct. R. 17.06 (Missouri); Mont. Code Ann. § 26-1-813 (Montana); Nev. Rev. Stat. § 48.109 (Nevada); N.H. Super. Ct. R. 170(E) (New Hampshire); N.M. Stat. Ann. Sections 44-7B-4 & 44-7B-5 (New Mexico); R. III of the N.C. Standards of Professional Conduct for Mediators, R. 8.3 of the Revised Rules of Professional Conduct of the N.C. State Bar, N.C. Settlement Conf. R. 4(F) & N.C. Gen. Stat. §§ 7A-38.1(l), 7A-38.4A(j) (North Carolina); N.D. Cent. Code § 31-04-11, N.D. R. Ct. 8.8 & N.D. Code of Mediation Ethics R. IV (North Dakota); Okla. Stat. tit. 12 § 1805 (applicable to proceedings under the Dispute Resolution Act); R. 10 & Appendices A & C of the Rules & Procedures for the Okla. Dispute Resolution Act & Okla. Stat. tit. 12, §§ 1824, 1836, 1837 (Oklahoma); Or. Rev. Stat. §§ 36.110, 36.220 to 36.238 (Oregon); Pa. Cons. Stat. § 5949 (Pennsylvania); R.I. Gen. Laws § 9-19-44 & R.I. Supreme Ct. Rule 35 (Rhode Island); R. 8 & Appendix B (Part V) of the S.C. Court-Annexed ADR Rules (South Carolina); Tenn. S.Ct. R. 31, §§ 7, 10(d), 11(b)(14)-(18), 12 & Appendix A, §§ 1(c)(4), 7 (Tennessee); Tex. Civ. Prac. & Rem. Code §§ 154.053, 154.073 (Texas); Va. Code Ann. §§ 8.01-576.10, 8.01-581.22 (Virginia); W.Va. Trial Ct. R. 25.12 (West Virginia); Wis. Stat. §§ 802.12(4), 904.085 (Wisconsin); Wyo. Stat. §§ 1-43-102, 1-43-103 (Wyoming).

348. Although Kentucky does not have a statute or statewide rule broadly addressing mediation communications, it does have a model rule on the topic (Ky. Model Ct. Mediation R. 12), which has served as a basis for numerous Kentucky local court rules. See, e.g., Ky. 11th Jud. Cir. L.R. 912.

349. New York just has (1) a few provisions that protect mediation communications in certain contexts, see, e.g., N.Y. Judiciary Law § 849-b(6), and (2) a provision that protects settlement negotiations (similar to Evid. Code §§ 1152 & 1154 in California), see N.Y. C.P.L.R. 4547.

Apparently, many New York mediators use contractual agreements to protect the confidentiality of their mediations. See, e.g., See [http://nysbar.com/blogs/ResolutionRoundtable/2013/04/mediation\\_privilege\\_in\\_new\\_yor.html](http://nysbar.com/blogs/ResolutionRoundtable/2013/04/mediation_privilege_in_new_yor.html) (New York mediators “have all sought confidentiality in mediation by contract.”). However, contractual confidentiality requirements generally are not binding on third parties.

350. Tennessee has a provision (Tenn. S.Ct. R. 31, § 7) that protects ADR proceedings “to the same extent as conduct or statements are inadmissible under Tennessee Rule of Evidence 408.” Tennessee’s Rule 408 is similar to California’s provisions that protect settlement negotiations (Evid. Code §§ 1152, 1154).

351. See, e.g., CLRC Staff Memorandum 2014-44 (describing Texas law); CLRC Staff Memorandum 2014-43 (describing Pennsylvania law); CLRC Staff Memorandum 2015-35, pp. 4-25 (describing Florida law); *id.* at 25-32 (describing Massachusetts law); *id.* at 32-40 (describing New York law).

- 1 encompassing attorney misconduct).<sup>352</sup> Those states are Florida,<sup>353</sup> Maine,<sup>354</sup>  
2 Maryland,<sup>355</sup> Michigan,<sup>356</sup> New Mexico,<sup>357</sup> North Carolina,<sup>358</sup> and Virginia.<sup>359</sup>

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352. Another state, Minnesota, has an exception that *expressly* concerns alleged misconduct of an attorney acting as a mediator (as opposed to an attorney representing a client in a mediation). See Minn. Stat. § 595.02, Subd. 1a, which provides:

*Alternative dispute resolution privilege* — No person presiding at any alternative dispute resolution proceeding established pursuant to law, court rule, or by an agreement to mediate, shall be competent to testify, in any subsequent civil proceeding or administrative hearing, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to any statement or conduct that could:

....  
(2) give rise to disqualification proceedings under the Rules of Professional Conduct for attorneys ....

353. See Fla. Stat. § 44.405(4)(a)(4) & (6), which provide:

(4)(a) ... there is no confidentiality or privilege ... for any mediation communication:

....  
4. Offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;

....  
6. Offered to report, prove, or disprove professional misconduct occurring during the mediation, solely for the internal use of the body conducting the investigation of the conduct.

354. See Maine R. Evid. 514(c)(5), which provides:

(c) **Exceptions.** There is no privilege under this rule:

....  
(5) *Party or counsel misconduct.* For communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation.

Another Maine provision protecting mediation communications — Maine R. Evid. 408(b) — does not have an exception that expressly addresses professional misconduct.

355. See Md. Code, Courts & Judicial Proceedings § 3-1804(b)(3), which provides:

(b) Disclosures allowed. — In addition to any other disclosure required by law, a mediator, a party, or a person who was present or who otherwise participated in a mediation at the request of the mediator or a party may disclose mediation communications:

....  
(3) To the extent necessary to assert or defend against allegations of professional misconduct or malpractice by a party or any person who was present or who otherwise participated in the mediation at the request of a party, except that a mediator may not be compelled to participate in a proceeding arising out of the disclosure ....

Another Maryland provision protecting mediation communications — Maryland Rule 17-105 — does not have an exception that expressly addresses professional misconduct.

356. See Mich. Ct. R. 2.412(D)(10) & (11), which provide:

(D) **Exceptions to Confidentiality.** Mediation communications may be disclosed under the following circumstances:

....  
(10) The disclosure is included in a report of professional misconduct filed against a mediation participant or is sought or offered to prove or disprove misconduct allegations in the attorney discipline process.

(11) The mediation communication occurs in a case out of which a claim of malpractice arises and the disclosure is sought or offered to prove or disprove a claim of malpractice against a mediation participant.

357. See N.M. Stat. Ann. § 44-7B-5(a)(8), which provides:



1 In ten other states, there is no mediation confidentiality exception that expressly  
2 addresses *attorney* misconduct or professional misconduct generally, but there is  
3 one that expressly addresses *mediator* misconduct.<sup>360</sup> The remaining seventeen  
4 states (plus California) do not have a mediation confidentiality exception that  
5 expressly addresses professional misconduct of any type.<sup>361</sup>

6 In considering these figures, it is important to bear in mind that they only reflect  
7 which jurisdictions have *expressly* addressed professional misconduct in a statute  
8 or rule protecting mediation communications. If a jurisdiction has not expressly  
9 addressed the subject, a court might still *imply* an exception for evidence of

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44-7B-5. A. Mediation communications are not confidential pursuant to the Mediation Procedures Act if they:

....  
(8) are sought or offered to disprove a claim or complaint of professional misconduct or malpractice based on conduct during a mediation and filed against a mediation party or nonparty participant ....

358. See N.C. Gen. Stat. § 7A-38.1(l)(3), which provides:

§ 7A-38.1.... (l) Inadmissibility of negotiations — Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted under this section, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other civil actions on the same claim, except:

....  
(3) In disciplinary proceedings before the State Bar or any agency established to enforce standards of conduct for mediators or other neutrals ....

N.C. Gen. Stat. § 7A-38.4A(j) (applicable to district court actions) is essentially identical to the provision shown above.

359. See Va. Code Ann. § 8.01-581.22(vii), which provides:

8.01-581.22. All memoranda, work products and other materials contained in the case files of a mediator ... are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, ... is confidential....

Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except ... (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation ....

Va. Code Ann. § 8.01-576.10(vii), applicable to court-referred dispute resolution proceedings, is similar in content.

360. See Ala. Civ. Ct. Mediation R.11(b)(3)(iii); Ariz. Rev. Stat. § 12-2238(B)(2); Colo. Rev. Stat. § 13-22-307(2)(D); Del. Super. Ct. Civ. R. 16(b)(4)(d)(ii) (but Del. Ch. Ct. R. 174 & 6 Del. Code § 7716 do not include an exception expressly that expressly addresses mediator misconduct); Ga. ADR R. VII(B); Kan. Stat. Ann. § 60-452a(b)(1); Kan. Stat. Ann. § 5-512(b)(1); Mont. Code Ann. § 26-1-813(5)(c); N.D. Cent. Code § 31-04-11(2); Okla. Stat. tit. 12 § 1805(F) (but Okla. Stat. tit. 12, § 1824 does not include an exception expressly that expressly addresses mediator misconduct); Or. Rev. Stat. § 36.222(5).

Some of the states with a mediation confidentiality exception that expressly addresses *attorney* misconduct or professional misconduct generally also have an exception that specifically addresses *mediator* misconduct. See, e.g., Maine R. Evid. 514(c)(4).

361. Those states are Alaska, Arkansas, Connecticut, Indiana, Louisiana, Massachusetts, Missouri, Mississippi, Nevada, New Hampshire, Pennsylvania, Rhode Island, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming.

1 alleged attorney misconduct or for evidence of professional misconduct more  
2 generally.

3 Further, if a jurisdiction lacks an exception expressly addressing professional  
4 misconduct, that does not necessarily mean that a mediation communication  
5 bearing on such misconduct will be inadmissible and protected from disclosure.  
6 The communication might still be subject to disclosure because it is beyond the  
7 scope of the provision protecting mediation communications, or because it falls  
8 within another type of exception.<sup>362</sup> Many of the mediation confidentiality statutes  
9 and rules are subject to a number of different of exceptions.<sup>363</sup> Of particular note,  
10 some of them include an exception relating to the enforcement of a mediated  
11 settlement agreement, similar to UMA Section 6(b)(2).<sup>364</sup>

### 12 *Extent of Variation in Expressly Addressing Attorney Misconduct and Other Professional* 13 *Misconduct*

14 In expressly addressing the relationship between mediation confidentiality and  
15 professional misconduct, states do not just vary in whether they focus on attorney  
16 misconduct, mediator misconduct, or professional misconduct generally. Rather,  
17 the statutes and rules differ in various other respects as well. For example:

- 18 • *Disciplinary Proceeding vs. Malpractice Proceeding.* Some states have  
19 separate exceptions for a disciplinary proceeding (e.g., a State Bar  
20 proceeding seeking suspension of an attorney for extortionate statements in  
21 a mediation) and a malpractice proceeding (e.g., a suit by a client against his  
22 attorney, seeking to recover damages for providing incorrect tax advice in a  
23 mediation).<sup>365</sup> Other states lump the two types of proceedings together in a  
24 single exception,<sup>366</sup> or provide an exception for only one of them.<sup>367</sup>
- 25 • *Proof of Allegations vs. Defense Against Allegations.* Some of the  
26 exceptions are even-handed, permitting use of mediation communications to  
27 prove or disprove alleged professional misconduct.<sup>368</sup> Florida's exceptions

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362. For example, an exception for evidence of fraud (see, e.g., Maine R. Evid. 408(b)), an exception for a disclosure required by statute (see, e.g., Ariz. Rev. Stat. § 12-2238(B)(3)), or a “manifest injustice” exception (see, e.g., Wisc. Stat. § 904.085(4)(e)).

363. See, e.g., Maine R. Evid. 514(c); N.M. Stat. Ann. § 44-7B-5; Wisc. Stat. § 904/085(4)(a).

364. See, e.g., Fla. Stat. § 44.405(4)(b) (giving no confidentiality to a mediation communication that is “[o]ffered for the limited purpose of establishing or refuting legally recognized grounds for voiding or reforming a settlement agreement reached during a mediation.”); La. Rev. Stat. § 9.4112(B)(1)(c) (permitting disclosure of mediation communications with respect to a “judicial determination of the meaning or enforceability of an agreement resulting from a mediation procedure if the court determines that testimony concerning what occurred in the mediation proceeding is necessary to prevent fraud or manifest injustice.”).

365. See, e.g., Fla. Stat. §§ 44.405(4)(a)(4), (6); Mich. Ct. R. 2.412(D)(10), (11).

366. See, e.g., Maine R. Evid. 514(c)(4), (5); N.M. Stat. Ann. § 44-7B-5(A)(8).

367. See, e.g., N.C. Gen. Stat. § 7A-38.1(I)(2).

368. See, e.g., Kan. Stat. Ann. § 60-452a (Mediation confidentiality and privilege shall not apply to “[i]nformation that is reasonably necessary to allow investigation of or action for ethical violations against

expressly extend not only to proving and defending against allegations of professional misconduct, but also to reporting of such misconduct.<sup>369</sup>

In other states, the statutory exception appears exclusively or primarily directed at allowing a mediator to defend against allegations of professional misconduct.<sup>370</sup>

- *Professional Misconduct During Mediation vs. Other Professional Misconduct.* Some provisions create an exception to mediation confidentiality only for evidence of professional misconduct that allegedly occurred *during* mediation.<sup>371</sup> In other states, the exception is not expressly limited to misconduct *during* mediation.<sup>372</sup>
- *In Camera Proceedings.* Some states use *in camera* procedures in handling mediation communications bearing on professional misconduct. For example, the Comment to Alabama’s mediation confidentiality provision explains: “Any review of mediation proceedings as allowed under Rule 11(b)(3) [relating to alleged mediator misconduct] should be conducted in an *in camera* hearing or by an *in camera* inspection.”<sup>373</sup>
- *Limitations on the Extent of Disclosure.* Some state impose explicit limitations on the extent to which mediation communications can be used to prove or disprove professional malfeasance. For example, Florida’s mediation confidentiality exception for professional malpractice applies “solely for the purpose of the professional malpractice proceeding.”<sup>374</sup>

the neutral person conducting the proceeding or for the defense of the neutral person or staff of an approved program conducting the proceeding in an action against the neutral person or staff of an approved program if the action is filed by a party to the proceeding.”); Maine R. Evid. 514(c)(4), (5) (There is no mediation privilege for communications sought or offered to “prove or disprove” a claim of professional misconduct or malpractice).

369. Fla. Stat. §§ 44.405(4)(a)(4), (6).

370. See, e.g., Ga. ADR R. VII(B) (“Confidentiality does not extend to documents or communications relevant to legal claims or disciplinary complaints brought against a neutral or an ADR program and arising out of an ADR process. Documents or communications relevant to such claims or complaints may be revealed only to the extent necessary to protect the neutral or ADR program.”); Okla. Stat. tit. 12, § 1805(F) (“If a party who has participated in mediation brings an action for damages against a mediator arising out of mediation, for purposes of that action the privilege provided for in subsection A of this section shall be deemed to be waived as to the party bringing the action.”).

371. See, e.g., Maine R. Evid. 514(c)(5) (There is no mediation privilege for “communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party *based on conduct occurring during a mediation.*”) (emphasis added); Va. Code Ann. § 8.01-581.22 (Mediation communications are confidential and protected from disclosure except “where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party’s legal representative *based on conduct occurring during a mediation.*”) (emphasis added).

372. See, e.g., Mich. Ct. R. 2.412(D)(10) (Mediation communication may be disclosed when “[t]he disclosure is included in a report of professional misconduct filed against a mediation participant or is sought or offered to prove or disprove misconduct allegations in the attorney discipline process.”).

373. Comment to Ala. Civ. Ct. Mediation R.11.

374. Fla. Stat. § 44.405(4)(a)(4); see also Fla. Stat. § 44.405(4)(a)(6) (imposing similar limitation with respect to investigation of professional misconduct).

1 Similarly, an Oregon provision says that “[i]n an action for damages or other  
2 relief between a party to a mediation and a mediator or mediation program,  
3 confidential mediation communications or confidential mediation  
4 agreements may be disclosed *to the extent necessary to prosecute or defend*  
5 *the matter.*”<sup>375</sup>

6 The Commission kept these variables in mind as it crafted its proposed legislation  
7 in this study.

#### 8 ***Case Law***

9 The Commission is aware of several cases from non-UMA jurisdictions that  
10 involve the intersection of a mediation confidentiality rule or statute and  
11 allegations of attorney misconduct.<sup>376</sup> Some of these cases are framed as a claim  
12 against an attorney for legal malpractice or another type of misconduct. Examples  
13 from Arizona, Oregon, and Texas reflect differing approaches to this type of  
14 situation.

15 *Grubaugh v. Blomo*.<sup>377</sup> This is an Arizona case that is similar to *Cassel* in many  
16 respects. A client sued her attorney for giving “substandard legal advice” during a  
17 family court mediation. In defending against her claim, the attorney sought to  
18 introduce some mediation communications. The trial court concluded that  
19 Arizona’s mediation privilege had been waived, but the client appealed from that  
20 ruling.

21 Relying on the language and legislative history of Arizona’s mediation privilege  
22 statute, the appellate court determined that there was no waiver and the attorney  
23 could not introduce any mediation communications. It further determined,  
24 however, that the client’s complaint could not include “any claim founded upon  
25 confidential communications during the mediation process.”<sup>378</sup>

26 The Arizona appellate court viewed that result as “sound policy.”<sup>379</sup> It explained:

27 By protecting all materials created, acts occurring, and communications made  
28 as a part of the mediation process, A.R.S. § 12-2238 establishes a robust policy of

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375. Or. Rev. Stat. § 36.222(5). The same provision further states that “[a]t the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.”

376. The Commission also considered *ZVI Construction Co., LLC v. Levy*, 90 Mass. App. Ct. 412, 60 N.E. 3d 368 (2016), which involves the intersection of a *contractual* mediation confidentiality requirement and allegations of attorney misconduct. The plaintiff brought suit against the attorney who had represented its opponents in a mediation, claiming that he had “engaged in misrepresentation and other wrongdoing” in connection with the mediated settlement agreement. *Id.* at 413. The trial court dismissed the plaintiff’s claims and the appellate court affirmed, explaining that the parties were sophisticated and their contractual mediation confidentiality requirement was not subject to a fraud exception. See *id.* at 420-22.

377. 238 Ariz. 264, 359 P.3d 1008 (Ariz. Ct. App. 2015).

378. *Id.* at 278.

379. *Id.* at 268.

1 confidentiality of the mediation process that is consistent with Arizona’s “strong  
2 public policy” of encouraging settlement rather than litigation. The statute  
3 encourages candor with the mediator throughout the mediation proceedings by  
4 alleviating parties’ fears that what they disclose in mediation may be used against  
5 them in the future. The statute similarly encourages candor between attorney and  
6 client in the mediation process.

7 Another reason confidentiality should be enforced here is that [the plaintiff] is  
8 not the only holder of the privilege. The privilege is also held by [her] former  
9 husband, the other party to the mediation. The former husband is not a party to  
10 this malpractice action and the parties before us do not claim he has waived the  
11 mediation process privilege. It is incumbent upon courts to consider and generally  
12 protect a privilege held by a non-party privilege-holder. The former husband has  
13 co-equal rights under the statute to the confidentiality of the mediation process.  
14 Although the superior court did rule that the privilege was not waived as to  
15 communications between the mediator and the former husband, waiving the  
16 privilege as to one party to the mediation may have the practical effect of waiving  
17 the privilege as to all. In order to protect the rights of the absent party, the  
18 privilege must be enforced.

19 Accordingly, we hold that the mediation process privilege applies in this case  
20 and renders confidential all materials created, acts occurring, and communications  
21 made as a part of the mediation process, in accordance with A.R.S. § 12-  
22 2238(B).<sup>380</sup>

23 *Alfieri v. Solomon*.<sup>381</sup> In this legal malpractice case, the Oregon Supreme Court  
24 took a different approach when interpreting Oregon’s statute protecting mediation  
25 communications. The client in *Alfieri* alleged that his attorney mishandled a  
26 mediation and other aspects of his case, causing the client to settle for less than the  
27 case was worth. The client sought to use various mediation-related  
28 communications to support his claim.

29 The Oregon Supreme Court concluded that “[p]rivate communications between  
30 a mediating party and his or her attorney outside of mediation proceedings ... are  
31 *not* ‘mediation communications’ as defined in the statute, even if integrally related  
32 to a mediation.”<sup>382</sup> As in *Grubaugh*, however, the Court excluded certain other  
33 evidence because it fell within the scope of the mediation confidentiality statute.

34 In so doing, the Court recognized that its interpretation of Oregon law “may  
35 make it difficult, in some circumstances, for clients to pursue legal malpractice  
36 claims against their attorneys for work in connection with mediations.”<sup>383</sup> Perhaps

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380. *Id.* at 268-69 (emphasis in original; citations omitted).

381. 358 Ore. 383, 365 P.3d 99 (2015).

382. *Id.* at 404 (emphasis added).

383. *Id.* at 405 n.10.

An earlier, unpublished legal malpractice case interpreting Oregon law is consistent with *Alfieri*. In *Fehr v. Kennedy*, 2009 U.S. Dist. LEXIS 63748 (D. Oregon 2009), *aff’d*, 2010 U.S. App. LEXIS 16953 (9th Cir. 2010), a couple sued their attorney and his law firm, alleging that they failed to properly represent the couple at a mediation, causing the couple to reject a favorable settlement offer and later obtain a bad result at trial.

1 uncomfortable with that result, it described the UMA exception for professional  
2 misconduct and said the Oregon Legislature “may wish to consider statutory  
3 changes based on the Uniform Mediation Act.”<sup>384</sup>

4 *Alford v. Bryant*.<sup>385</sup> The court in this Texas legal malpractice case took still  
5 another approach. The fact scenario began when a dispute was settled through  
6 mediation, except for the allocation of attorney’s fees and costs. A later ruling  
7 required each side to bear its own attorney’s fees and costs.

8 One of the mediation parties then sued her attorney, contending that the attorney  
9 failed to disclose the risks and benefits of settlement, including the risk that the  
10 trial court would deny recovery of her attorney’s fees. In defense, the attorney said  
11 that she had made such disclosures to her client, during a discussion that included  
12 the two of them and the mediator. The attorney tried to call the mediator to testify  
13 about that discussion, but the trial court said the testimony was barred by a Texas  
14 mediation confidentiality provision.<sup>386</sup>

15 The attorney appealed and the Texas Court of Appeals reversed and remanded.  
16 Its decision rested in part on what is known in Texas as the “offensive use  
17 doctrine.”<sup>387</sup> Importantly, however, its decision also relied *Avary v. Bank of*  
18 *America, N.A.*, a professional malpractice case against a bank fiduciary (not an  
19 attorney) in which the court construed another Texas mediation confidentiality  
20 provision<sup>388</sup> to permit the introduction of mediation evidence *for purposes of*  
21 *proving an “independent tort” committed during mediation that encompasses a*  
22 *duty to disclose, but only if the trial judge conducts an in camera hearing and*  
23 *determines that the “facts, circumstances, and context” warrant disclosure.*<sup>389</sup>

24 The *Alford* court made clear that the *Avary* doctrine applied to the case before it:

25 As in *Avary*, the parties to the original litigation peacefully resolved their  
26 dispute. Again, as in *Avary*, one of the parties now seeks to prove a new and  
27 independent cause of action that is alleged to have occurred during the mediation  
28 process. That party does not propose to discover or use the evidence to obtain

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The federal district court granted summary judgment for the attorney and his law firm, because the case depended entirely on mediation communications, which were inadmissible under Oregon’s mediation confidentiality statute. The district court did not have to resolve whether the statute protected the couple’s private communications with their attorney, outside the presence of the mediation and not disclosed to the other mediation parties. See *id.* at \*12-13. The Ninth Circuit affirmed, explaining that “[w]ithout admitting confidential mediation communications, the record is devoid of any evidence of legal malpractice.” *Fehr v. Kennedy*, 2010 U.S. App. LEXIS 16953, at \*4 (9th Cir. 2010).

384. *Id.*

385. 137 S.W.3d 916 (Tex. Ct. App. 2004).

386. Tex. Civ. Prac. & Rem. Code § 154.053.

387. The Texas offensive use doctrine holds that a plaintiff may not “invoke the jurisdiction of the courts in search of affirmative relief, and yet, on the basis of privilege, deny a party the benefit of evidence that would materially weaken or defeat the claims against her.” *Id.* at 921.

388. Tex. Civ. Prac. & Rem. Code § 154.073(e).

389. 72 S.W. 3d 770 (Tex. Ct. App. 2002).

additional funds from the settling roofing contractor in the underlying litigation. The confidential information was offered in this separate and distinct case arising between one of the parties to the underlying litigation and her attorney.

The new cause of action asserted by [the client] below involved [her attorney's] alleged legal malpractice during the mediation proceedings. Significant substantive and procedural rights of [the attorney] are implicated, including the opportunity to develop evidence of her defense to the claim of legal malpractice and to submit contested fact issues to the fact-finder. In pursuing her defense, [the attorney] will not disturb the settlement in the underlying litigation. From a policy standpoint, these considerations support disclosure of the confidential communications at issue in this case.<sup>390</sup>

*Alford* thus extended the *Avary* doctrine to mediator testimony in a legal malpractice case.<sup>391</sup>

*Cases that seek to undo mediated settlement agreements.* In non-UMA states, allegations of mediation-related attorney misconduct have surfaced not only in some legal malpractice cases, but also in some cases that seek to enforce or undo a mediated settlement agreement. There are a few examples from Texas. From those cases<sup>392</sup> and some Texas cases involving other types of professionals,<sup>393</sup> it appears

390. *Alford*, 137 S.W.3d at 922 (citations omitted).

391. For a more detailed discussion of *Avary* and *Alford*, see CLRC Staff Memorandum 2014-44, pp. 7-15.

*Nova Casualty Co. v. Santa Lucia*, 2010 U.S. Dist. LEXIS 58693 (M.D. Fla. 2010), is another legal malpractice case that involved a mediation-related allegation of attorney misconduct. In particular, a client alleged that an attorney gave negligent advice about a High-Low agreement during a mediation. The court's decision did not resolve that allegation on the merits or address mediation confidentiality. See *id.* at \*1.

Rather, the court explained that the mediation took place before the defendant attorney joined one of the defendant law firms. The court denied that firm's motion for summary judgment, explaining that "[w]hether [the attorney's] alleged negligent acts continued after he joined [the firm] on September 1, 2006, remains an issue of fact to be decided by a jury." *Id.* at \*7.

A further example interpreting law from a non-UMA state is *McKissock & Hoffman, P.C. v. Waldron*, 2011 U.S. Dist. LEXIS 86834 (2011), in which a client alleged that its law firm committed malpractice during a mediation by failing to advise the company to accept a particular settlement offer. Due to the posture of the case, the federal district court dismissed it without having to resolve whether permitting the mediator to testify would be a violation of Pennsylvania's mediation confidentiality statute. But the matter sparked discussion within Pennsylvania legal circles about "whether the Pennsylvania mediation privilege statute makes it virtually impossible to prove legal malpractice committed during the mediation." Abraham Gafni, *Does the Mediation Privilege Apply in Legal Malpractice Cases?*, *The Legal Intelligencer* (Oct. 25, 2011), p. 1.

392. See *Rabe v. Dillard's, Inc.*, 214 S.W.3d 767 (Tex. Ct. App. 2007) (upholding summary judgment against woman who claim she signed mediated settlement agreement under duress due to opposing counsel's threat to tell worker's compensation carrier she had prior injury; mediation communications were confidential, so "there was no competent summary judgment evidence of a threat"); *Lype v. Watkins*, 1998 Tex. App. LEXIS 6626 (Tex. Ct. App. 1998) (party sought to avoid enforcement of mediated settlement agreement due to alleged duress by opposing counsel, but court said settlement agreement cannot be avoided based on actions of attorney for settling party).

that the *Avary* exception described above only applies in a suit for an “independent tort,” not in a suit seeking to undo or enforce a mediated settlement agreement.<sup>394</sup>

There are also several examples construing Florida law, which includes a mediation confidentiality exception for evidence relating to the validity and enforcement of a mediated settlement agreement.<sup>395</sup> All of those claims against attorneys were unsuccessful; they involved the following situations:

- An attempt to set aside a mediated settlement agreement on grounds that the opposing attorney engaged in duress or coercion. In a published decision, a Florida appellate court determined that the record (which presumably included mediation communications) adequately supported the trial court’s finding that the opposing attorney was not involved in any duress or coercion.<sup>396</sup>
- An unpublished federal district court decision in which the plaintiff alleged that a mediated settlement agreement was obtained through duress. She allegedly felt threatened when the opposing attorney warned (during mediation) that her opponent might seek recovery of attorney’s fees. After considering testimony about the mediation, the court found that the attorney’s warning did “not rise to a level of coercion or support Plaintiff’s claim that she was placed in a state of duress.”<sup>397</sup>
- Another unpublished federal district court decision, in which a client sought to avoid a mediated settlement agreement due to alleged misconduct on the part of his own attorney. The court concluded that “Plaintiff’s mere

393. See *Hydroscience Technologies, Inc. v. Hydroscience, Inc.*, 401 S.W.3d 783 (Tex. Ct. App. 2013) (declining to apply *Avary* doctrine to dispute over mediated settlement agreement); *In re Empire Pipeline Co.*, 323 S.W.3d 308 (Tex. Ct. App. 2010) (same); *Allison v. Fire Ins. Exchange*, 98 S.W.3d 227 (Tex. Ct. App. 2002), *pet. granted, judgment vacated w/out reference to the merits* (Tex. S.Ct. 2004) (same).

394. A counterexample is an unpublished 1996 opinion, in which a Texas Court of Appeal said that the trial court erred in excluding mediation communications proffered to show duress with respect to a mediated settlement agreement. See *Randle v. Mid Gulf*, 1996 Tex. App. LEXIS 3451 (Tex. Ct. App. 1996).

A Texas law professor says *Randle* was wrongly decided, because “[t]he Texas ADR Act’s confidentiality provisions do not include an exception for providing evidence of traditional contract defenses.” Brian Shannon, *Confidentiality of Texas Mediations: Ruminations on Some Thorny Problems*, 32 Tex. Tech. L. Rev. 77 (2000); see also Edward Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising From the Texas Experience*, 38 S. Tex. L. Rev. 541, 557-58 (1997) (warning that *Randle* approach could “considerably reduce the confidentiality protection of the Texas ADR Act if there will always be a waiver of confidentiality whenever a contract defense is asserted.”).

395. See Fla. Stat. § 44.405(4)(b) (There is no confidentiality or privilege for a mediation communication that is “[o]ffered for the limited purpose of establishing or refuting legally recognized grounds for ordering or reforming a settlement agreement reached during a mediation.”).

396. *Vitakis-Valchine v. Valchine*, 793 So.2d 1094, 1096 (Fla. Ct. App. 2001). The appellate court also held:

(1) The record adequately supported the trial court’s finding that the opposing party was not involved in any duress or coercion. See *id.*

(2) Remand was necessary to determine whether the mediator engaged in misconduct. See *id.* at 1100.

397. *Clark v. School Bd.*, 2010 U.S. Dist. LEXIS 120216, at \*12 (M.D. Fla. 2010).



1 dissatisfaction with the advice of her attorney cannot support a finding that  
2 his agreement to settle and release his claims was not knowing or  
3 voluntary.”<sup>398</sup>

4 **Federal Law**

5 [To be drafted for the June meeting, primarily from CLRC Staff Memoranda  
6 2014-45 and 2014-58.]

7 **Empirical Evidence**

8 [To be drafted for the June meeting, primarily from CLRC Staff Memoranda  
9 2015-5 and 2015-6.]

10 **Scholarly Views**

11 [To be drafted for the June meeting, primarily from CLRC Staff Memoranda  
12 2015-23 and 2015-35.]

13 **Possible Approaches**

14 [To be drafted for the June meeting. As requested by the Legislature, this section  
15 will discuss contractual waivers and Evidence Code Section 958, as well as other  
16 possible approaches.]

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398. *Shepard v. Florida Power Corp.*, 2010 U.S. Dist. LEXIS 58693, at \*1 (M.D. Fla. 2010).

For further discussion of the law of non-UMA states, see CLRC Staff Memorandum 2014-35; First Supplement to CLRC Staff Memorandum 2014-35; CLRC Staff Memorandum 2014-43; CLRC Staff Memorandum 2014-44; CLRC Staff Memorandum 2014-59; CLRC Staff Memorandum 2015-54, pp. 5-7; CLRC Staff Memorandum 2016-30, pp. 12-15.

## PART II. PRELIMINARY CONCLUSIONS

1 Since the Commission commenced this study in mid-2013, it has held twenty-  
2 one public meetings, heard testimony from more than seventy people (many of  
3 them repeatedly), received written comments from hundreds of individuals and  
4 more than thirty organizations, and considered almost ninety staff memoranda on  
5 the subject (totaling thousands of pages). Based on the information received thus  
6 far and the matters discussed in Part I of this report, the Commission has  
7 tentatively concluded that existing California law does not place enough weight on  
8 the interest in holding an attorney accountable for malpractice or other  
9 professional misconduct in a mediation context.

10 By precluding the use of mediation communications in a subsequent  
11 noncriminal proceeding, such as a legal malpractice case based on how an attorney  
12 handled a mediation, the mediation confidentiality provisions (particularly  
13 Evidence Code Section 1119) make it difficult and sometimes impossible for a  
14 client to provide any evidence in support of allegations of attorney misconduct  
15 during a mediation. Existing law may also prevent an attorney from proffering  
16 mediation communications to disprove such allegations.

17 The Commission believes that courts need to be able to effectively evaluate  
18 allegations that an attorney engaged in misconduct in the mediation process. In its  
19 view, public confidence in the administration of justice depends on providing such  
20 an opportunity to the citizens of this state.

### 21 Proposed New Exception to Mediation Confidentiality

22 To address this situation, the Commission tentatively recommends creating a  
23 new exception to Section 1119, which would focus on holding attorneys  
24 accountable for mediation misconduct, while also allowing attorneys to effectively  
25 rebut meritless misconduct claims.<sup>399</sup> The Commission considers this important not  
26 only for purposes of achieving justice, but also to ensure the appearance of justice.

27 In proposing this approach, the Commission recognizes that the policy interests  
28 underlying the mediation confidentiality statutes are significant and warrant  
29 protection. A careful balancing of the competing interests is necessary.

30 The proposed new exception would therefore be narrow, so as to help protect the  
31 confidentiality expectations of mediation participants. In particular, the proposed  
32 new exception would be subject to a number of important limitations, as explained  
33 below.

### 34 Limitations to Protect the Policies Underlying Mediation Confidentiality

35 Over a period of more than a year, the Commission considered the best means to  
36 draft a new exception to the mediation confidentiality statutes. The Commission

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399. See proposed Evid. Code § 1120.5 & Comment *infra*.

1 tentatively recommends that the exception incorporate the following features to  
2 minimize harm to the policy interests served by those statutes.

3 ***No Undoing Settlements***

4 The proposed new exception would not apply in resolving a claim relating to the  
5 enforcement of a mediated settlement agreement, such as a claim for rescission of  
6 such an agreement or a suit for specific performance.<sup>400</sup> This limitation is designed  
7 to preserve the finality of a mediated settlement agreement<sup>401</sup> and protect against  
8 claims based on buyer's remorse.<sup>402</sup> Once parties resolve a dispute through  
9 mediation and properly memorialize their agreement, they should be able to rely  
10 on that agreement and put the dispute behind them.

11 ***The Exception Would Apply Only in a State Bar Disciplinary Proceeding or a Claim for***  
12 ***Damages Due to Legal Malpractice***

13 The proposed new exception would only apply in the following types of claims:

- 14 (1) A disciplinary proceeding under the State Bar Act<sup>403</sup> or a rule or regulation  
15 promulgated pursuant to that Act.<sup>404</sup> Such a proceeding serves the critical  
16 function of protecting the public from attorney malfeasance.
- 17 (2) A cause of action seeking damages from a lawyer based on alleged  
18 malpractice.<sup>405</sup> This type of claim further promotes attorney accountability,  
19 while also providing a means of compensating a client for breach of an  
20 attorney's professional duties.

21 The proposed new exception would not apply in any other type of claim, because  
22 that does not appear necessary to accomplish the Commission's objectives.<sup>406</sup>

23 ***The Exception Would Apply Only to Attorney Misconduct in a Professional Capacity***

24 The proposed new exception would only apply to a mediation communication  
25 bearing on an allegation that an attorney breached a *professional requirement*.<sup>407</sup>

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400. See proposed Evid. Code § 1120.5 Comment *infra*.

401. See *id.*; see also CLRC Staff Memorandum 2015-46, Exhibit p. 218 (Guy Kornblum's comment that "There has to be closure."); CLRC Staff Memorandum 2015-45, Exhibit p. 12 (Paul Dubow's comment that "One of the major attractions to mediation is that a successful outcome will buy peace, i.e., the matter is ended permanently and the parties can go on with their lives.").

402. See proposed Evid. Code § 1120.5 Comment *infra*; see also CLRC Staff Memorandum 2015-46, Exhibit p. 107 (Timothy D. Martin's comment that "Settlor's (Buyer's) remorse is a common reaction to settling a case."); CLRC Staff Memorandum 2015-54, Exhibit p. 35 (Jessica Lee-Messer's comment to same effect).

403. Bus. & Prof. Code §§ 6000 *et seq.*

For a brief description of the process used in a State Bar disciplinary proceeding, see CLRC Staff Memorandum 2015-22, pp. 42-48.

404. See proposed Evid. Code § 1120.5(a)(2)(A) & Comment *infra*.

405. See proposed Evid. Code § 1120.5(a)(2)(B) & Comment *infra*.

406. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 19-24.

The exception is thus limited to an attorney’s conduct in a professional capacity. More precisely, the exception would apply “when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has *by virtue of* being an attorney — in the course of providing professional services.”<sup>408</sup> Misconduct does not arise in the course of providing professional services merely because it occurs during a period of legal representation or because providing such representation brought an attorney and client together and thus gave the attorney an opportunity to engage in the misconduct.<sup>409</sup>

***The Exception Would Only Apply to Alleged Misconduct in Representing a Client, Not in Serving as a Mediator***

The proposed new exception would only apply to allegations that an attorney committed misconduct in *representing a client*, not in serving as a mediator.<sup>410</sup> The exception is thus focused specifically on the concern raised in the cases that were the impetus for this study.<sup>411</sup> Expanding the exception further would pose many questions and complications, which could hinder or delay achievement of the Commission’s objectives.<sup>412</sup>

***The Exception Would Apply Only to Alleged Misconduct That Occurs in a Mediation Context***

The proposed new exception would only apply to misconduct that allegedly occurred *in the context of* a mediation or a mediation consultation.<sup>413</sup> This situation is most problematic under existing law, because much, if not all, of the relevant evidence for both sides might fall within the scope of Section 1119 and thus be unavailable in resolving whether misconduct actually occurred.<sup>414</sup>

Importantly, however, the exception would extend to alleged misconduct at *any* stage of the mediation process: during a mediation consultation, a face-to-face mediation session with the mediator and all parties present, a private caucus with

407. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*.

408. *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015).

409. *Id.* at 1239. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 17-25; see also First Supplement to CLRC Staff Memorandum 2015-45, Exhibit pp. 2-3 (comments of Rachel Ehrlich).

410. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*.

411. See *supra* note 26 & accompanying text.

412. See CLRC Staff Memorandum 2015-45, pp. 9-17.

413. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*.

A similar limitation applies under the UMA’s exception for professional misconduct, as well as in Florida, Maine, New Mexico, Texas, and Virginia. See UMA § 6(a)(6); Fla. Stat. § 44.405(4)(a)(4) & (6); Maine R. Evid. 514(c)(5); N.M. Stat. Ann. § 44-7B-5(a)(8); Va. Code Ann. §§ 8.01-576.10(vii), 8.01-581.22(vii); see also *Alford*, 137 S.W. 3d at 922; *Avary*, 72 S.W. 3d at 802-03.

414. See discussion of “Loss of Evidence May Mean Culpable Conduct Goes Unpunished or Another Inequitable Result Occurs” *supra*.

1 or without the mediator, a mediation brief, a mediation-related phone call, or any  
2 other mediation-related activity.<sup>415</sup> The determinative factor is whether the  
3 misconduct allegedly occurred in a mediation context, not the time and date of the  
4 alleged misconduct.<sup>416</sup>

5 ***The Exception Would Not Change the Rule on Mediator Competency to Testify***

6 Subject to some exceptions and limitations, Evidence Code Section 703.5 makes  
7 a mediator incompetent to testify about a mediation in a subsequent civil  
8 proceeding:

9 703.5. No person presiding at any judicial or quasi-judicial proceeding, and no  
10 arbitrator or mediator, shall be competent to testify, in any subsequent civil  
11 proceeding, as to any statement, conduct, decision, or ruling, occurring at or in  
12 conjunction with the prior proceeding, except as to a statement or conduct that  
13 could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the  
14 subject of investigation by the State Bar or Commission on Judicial Performance,  
15 or (d) give rise to disqualification proceedings under paragraph (1) or (6) of  
16 subdivision (a) of Section 170.1 of the Code of Civil Procedure. However, this  
17 section does not apply to a mediator with regard to any mediation under Chapter  
18 11 (commencing with Section 3160) of Part 2 of Division 8 of the Family Code.

19 This restriction serves to safeguard perceptions of mediator impartiality and  
20 protects a mediator from burdensome requests for testimony.<sup>417</sup> Given those  
21 beneficial effects, the Commission’s proposed new exception would not change or  
22 otherwise affect Section 703.5.<sup>418</sup>

23 ***The Exception Would Limit the Extent of Disclosure***

24 If a mediation communication satisfied the requirements of the proposed new  
25 exception (i.e., it is proffered in the correct type of case and it is relevant to an  
26 allegation that an attorney “breached a professional requirement in the context of a  
27 mediation or a mediation consultation”), then *only the portion of the*  
28 *communication necessary for application of the exception* could be admitted or  
29 disclosed.<sup>419</sup> Admission or disclosure of a mediation communication pursuant to

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415. See proposed Evid. Code § 1120.5 Comment *infra*.

416. See *id*.

For further discussion of the requirement that the alleged misconduct be in a mediation context, see CLRC Staff Memorandum 2015-45, pp. 17-21.

417. See discussion of “Special Considerations Relating to Mediator Testimony” *supra*.

418. See “Proposed Legislation” *infra*. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 41-43.

419. See proposed Evid. Code § 1120.5(b) *infra*.

1 the exception would not render that evidence (or any other mediation  
2 communication) admissible or discoverable for any other purpose.<sup>420</sup>

3 This restriction is modeled on a provision in the UMA.<sup>421</sup> It would serve to  
4 minimize the extent of disclosure of mediation communications and thus help to  
5 preserve the confidentiality expectations of mediation participants,<sup>422</sup> particularly  
6 persons who have no part in the attorney-client dispute triggering use of the  
7 Commission’s proposed new exception.<sup>423</sup>

8 ***A Court Could Use Judicial Tools to Limit Public Exposure of Mediation Communications***

9 The proposed new exception would expressly permit a court to “use a sealing  
10 order, a protective order, a redaction requirement, an in camera hearing, or a  
11 similar judicial technique to prevent public disclosure of mediation evidence,  
12 consistent with the requirements of the First Amendment to the United States  
13 Constitution, Sections 2 and 3 of Article I of the California Constitution, Section  
14 124 of the Code of Civil Procedure, and other provisions of law.”<sup>424</sup> A court would  
15 thus have discretion to use existing procedural mechanisms to prevent widespread  
16 dissemination of mediation evidence admitted or disclosed pursuant to the new  
17 provision, so long as the court complies with the First Amendment right of access  
18 and other laws that promote government transparency.<sup>425</sup> Like the UMA-based  
19 restriction discussed above, the use of such procedural mechanisms would help to  
20 preserve the confidentiality expectations of mediation participants.

21 ***Mediation Participants Would Receive Notice and Could Thus Take Steps to Prevent Improper***  
22 ***Disclosure of Mediation Communications***

23 Under the proposed new exception, if a plaintiff files a complaint that includes a  
24 cause of action for damages against an attorney based on alleged malpractice in  
25 the context of a mediation or a mediation consultation, the plaintiff must serve the  
26 complaint on all of the mediation participants whose identities and addresses are

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420. See *id.* For example, if a court admitted a mediation communication in a legal malpractice case stemming from a mediation, that evidence would not be admissible under the proposed new exception in the mediated dispute. Further, only the portion of the mediation communication that is relevant to the legal malpractice case could be admitted for purposes of that case, not any other portion.

421. See UMA § 6(d).

422. Consistent and careful compliance with this restriction would be key, because predictability of an evidentiary protection for sensitive communications may be necessary to accomplish its objectives. See, e.g., *Jaffee v. Redmond*, 518 U.S. 1, 18 (1996). Application of California’s mediation confidentiality protections is already unpredictable to some extent. See discussion of “Federal Law” *supra*.

423. For sources discussing the importance of protecting the confidentiality expectations of mediation participants who have no part in a post-mediation dispute, see, e.g., *Cassel*, 51 Cal. 4th at 136; *id.* at 139 (Chin, J., concurring); *Grubaugh*, 238 Ariz. at 268-69; Gafni, *supra* note 391, at 1.

424. See proposed Evid. Code § 1120.5(c) *infra*.

425. For further discussion of this point, see CLRC Staff Memorandum 2016-18; CLRC Staff Memorandum 2015-55; CLRC Staff Memorandum 2015-45, pp. 27-30, 33-41.

1 reasonably ascertainable.<sup>426</sup> This notice requirement would alert mediation  
2 participants who would not otherwise be involved in the malpractice case to the  
3 possibility of disclosure of mediation communications in connection with that  
4 case. Such participants would thus have an opportunity to speak up and guard  
5 against any improper disclosure.<sup>427</sup>

#### 6 **Other Features of the Proposed New Exception**

7 In addition to the above-described features, which would help minimize harm to  
8 the policy interests underlying the mediation confidentiality statutes, the proposed  
9 new exception would have a number of other noteworthy features. These include:

- 10 • The exception would apply evenhandedly. It would permit use of mediation  
11 communications in specified circumstances to prove *or* disprove allegations  
12 against an attorney.<sup>428</sup>
- 13 • The exception would apply to all types of mediation communications and  
14 writings, not just to a particular category (such as communications made in a  
15 private caucus between an attorney and a client).<sup>429</sup>
- 16 • The exception would use the same standard for both admissibility and  
17 disclosure of mediation evidence: To fall within the exception, the evidence  
18 would have to be “*relevant* to prove or disprove an allegation that a lawyer  
19 breached a professional requirement when representing a client in the  
20 context of a mediation or a mediation consultation.”<sup>430</sup>
- 21 • The exception would apply across-the-board; there would not be any  
22 carveouts for particular types of cases.<sup>431</sup>
- 23 • The exception would expressly state that “[n]othing in this section is  
24 intended to affect the extent to which a mediator is, or is not, immune from

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426. See proposed Evid. Code § 1120.5(d) & Comment *infra*.

427. See proposed Evid. Code § 1120.5 Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2016-58, p. 36.

428. See proposed Evid. Code § 1120.5(a)(1) & Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 25-27; CLRC Staff Memorandum 2014-43, p. 13; CLRC Staff Memorandum 2014-6, p. 16.

429. See proposed Evid. Code § 1120.5 *infra*. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 31-33.

430. Proposed Evid. Code § 1120.5(a)(1) *infra* (emphasis added). For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 10-17; see also CLRC Staff Memorandum 2015-55, pp. 18 (Texas approach), 27-28 (*Olam* approach).

431. See proposed Evid. Code § 1120.5 *infra*. For further discussion of this point, see CLRC Staff Memorandum 2016-58, pp. 25-33 (discussing exemption requests for (1) family law mediations and (2) community-based mediation programs funded under Dispute Resolution Programs Act); see also CLRC Staff Memorandum 2017-8, pp. 5-7 (discussing PERB request for exemption).

1 liability under existing law.”<sup>432</sup> It would thus be clear that existing law  
2 governing mediator immunity would remain unchanged.<sup>433</sup>

- 3 • The exception would not include any sanctions provision. The Commission  
4 believes that existing law governing the availability of sanctions will be  
5 sufficient to address any potential abuse of the new exception.<sup>434</sup>
- 6 • The exception would only apply to evidence relating to a mediation or  
7 mediation consultation that commences on or after the exception becomes  
8 operative. To avoid disrupting confidentiality expectations of mediation  
9 participants, the new exception would not apply retroactively.<sup>435</sup>

## 10 Request For Comments

11 In this study, the Commission is using its traditional study process, which is  
12 careful, deliberative, and transparent.<sup>436</sup> All of its meetings are open to the public,  
13 interested persons are encouraged to participate in the discussions, written  
14 comments are welcome at any time, and the Commission’s written materials are  
15 freely available on its website.<sup>437</sup>

16 In the resolution requesting this study, the Legislature asked the Commission to  
17 seek input from a broad range of sources, “including, but not limited to,  
18 representatives from the California Supreme Court, the State Bar of California,  
19 legal malpractice defense counsel, other attorney groups and individuals,  
20 mediators, and mediation trade associations.”<sup>438</sup> That is consistent with how the  
21 Commission normally conducts its studies; input from a wide spectrum of  
22 knowledgeable sources is invaluable in the Commission’s study process.

23 The Commission is fortunate to have already received considerable input in this  
24 study, from persons with a wide variety of views.<sup>439</sup> The Commission much  
25 appreciates that input and is eager to hear further comments.

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432. See proposed Evid. Code § 1120.5(e) *infra*.

433. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 15-17; CLRC Staff Memorandum 2015-22, pp. 34-42.

434. See proposed Evid. Code § 1120.5 & Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2015-45, pp. 43-44.

435. See proposed uncodified provision & Comment *infra*. For further discussion of this point, see CLRC Staff Memorandum 2015-45, p. 44.

436. Information on the Commission’s study process is available on the Commission’s website at [http://www.clrc.ca.gov/Menu5\\_about/process.html](http://www.clrc.ca.gov/Menu5_about/process.html). See also Memorandum 2012-1; B. Gaal, *Evidence Legislation in California*, 36 Southwestern Univ. L. Rev. 561 (2008). For a detailed discussion about the use of Commission materials to determine legislative intent, see *2013-2014 Annual Report*, 43 Cal. L. Revision Comm’n Reports 253, 266-73 (2013) & sources cited therein.

437. See <http://www.clrc.ca.gov/K402.html>. At the bottom of that webpage, interested persons can electronically subscribe to receive new materials relating to this study as they are generated.

438. 2012 Cal. Stat. res. ch. 108.

439. The Commission has received numerous comments from professionals with relevant expertise, including mediators, attorneys, judges, and legal scholars. Mediation parties typically lack expertise in the



1 Written comments can be in any format<sup>440</sup> and can be submitted by email<sup>441</sup> or  
2 by a traditional mail or delivery service.<sup>442</sup> It is just as important to express support  
3 for aspects of the tentative recommendation as it is to express opposition or  
4 concern.

5 It is not necessary or desirable to give a detailed description of actual mediation  
6 events. Such a description might affect pending litigation or be deemed a violation  
7 of existing rules governing mediation confidentiality. For the Commission's  
8 purposes, describing a mediation situation in hypothetical terms is preferable.

9 **To receive maximum consideration, comments should be submitted by**  
10 **[date].** Comments are still welcome later, but they may not be analyzed and  
11 considered as carefully as ones that arrive within the specified comment period.

12 After the comment period on the tentative recommendation ends, the  
13 Commission will consider the written input received and any additional comments  
14 made in oral testimony at public meetings. The Commission might substantially  
15 revise the tentative report and/or tentative recommendation in response to that  
16 input, or it might even change its approach and issue a new tentative  
17 recommendation. Thus, this tentative recommendation is not necessarily the  
18 recommendation the Commission will submit to the Legislature.

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field, but they also have an important perspective to offer. Among other things, they are less likely to be self-interested in this area than mediation professionals.

The Commission has made special efforts to obtain input from mediation parties, because they are not organized in cohesive, well-established stakeholder groups like mediation professionals. See CLRC Minutes (Sept. 2014), p. 4; CLRC Staff Memorandum 2014-60, pp. 2-4. Many mediation parties have already provided comments. See, e.g., CLRC Staff Memorandum 2017-9, Exhibit pp. 27-28 (comments of Angela Spanos); CLRC Staff Memorandum 2016-50, Exhibit pp. 1-2 (comments of Eddie Bernacchi, et al., on behalf of Air Conditioning Sheet Metal Ass'n, California Chapters of the National Electrical Contractors Ass'n, California Legislative Conference of the Plumbing, Heating & Piping Industry, Northern California Allied Trades, Wall & Ceiling Alliance, Associated General Contractors, California Building Industry Ass'n, Construction Employers Ass'n, Southern California Contractors Ass'n, United Contractors & Western Line Constructors); CLRC Staff Memorandum 2015-46, Exhibit pp. 234-35 (comments of Bonnie P. Harris); First Supplement to CLRC Staff Memorandum 2013-47, Exhibit pp. 5 (comments of Bill Chan), 17-23 (comments of Deborah Blair Porter); Second Supplement to CLRC Staff Memorandum 2013-39, Exhibit pp. 1-2 (comments of Kazuko Artus); CLRC Staff Memorandum 2014-36, Exhibit pp. 3-4 (comments of Jullie Doyle), 5-8 (comments of Karen Mak).

440. It is not necessary to submit multiple copies. One copy directed to the staff is sufficient.

441. Comments can be emailed to [bgaal@clrc.ca.gov](mailto:bgaal@clrc.ca.gov).

442. Comments can be mailed to:

Barbara Gaal, Chief Deputy Counsel  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, CA 94303

### PART III. PROPOSED LEGISLATION

**Evid. Code § 1120.5 (added). Alleged misconduct of lawyer when representing client in mediation context**

SEC. \_\_\_\_\_. Section 1120.5 is added to the Evidence Code, to read:

1120.5. (a) A communication or a writing that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation, is not made inadmissible, or protected from disclosure, by provisions of this chapter if both of the following requirements are satisfied:

(1) The evidence is relevant to prove or disprove an allegation that a lawyer breached a professional requirement when representing a client in the context of a mediation or a mediation consultation.

(2) The evidence is sought or proffered in connection with, and is used solely in resolving, one of the following:

(A) A complaint against the lawyer under the State Bar Act, Chapter 4 (commencing with Section 6000) of the Business and Professions Code, or a rule or regulation promulgated pursuant to the State Bar Act.

(B) A cause of action for damages against the lawyer based upon alleged malpractice.

(b) If a mediation communication or writing satisfies the requirements of subdivision (a), only the portion of it necessary for the application of subdivision (a) may be admitted or disclosed. Admission or disclosure of evidence under subdivision (a) does not render the evidence, or any other mediation communication or writing, admissible or discoverable for any other purpose.

(c) In applying this section, a court may, but is not required to, use a sealing order, a protective order, a redaction requirement, an in camera hearing, or a similar judicial technique to prevent public disclosure of mediation evidence, consistent with the requirements of the First Amendment to the United States Constitution, Sections 2 and 3 of Article I of the California Constitution, Section 124 of the Code of Civil Procedure, and other provisions of law.

(d) Upon filing a complaint or a cross-complaint that includes a cause of action for damages against a lawyer based on alleged malpractice in the context of a mediation or a mediation consultation, the plaintiff or cross-complainant shall serve the complaint or cross-complaint by mail, in compliance with Sections 1013 and 1013a of the Code of Civil Procedure, on all of the mediation participants whose identities and addresses are reasonably ascertainable. This requirement is in addition to, not in lieu of, other requirements relating to service of the complaint or cross-complaint.

(e) Nothing in this section is intended to affect the extent to which a mediator is, or is not, immune from liability under existing law.

**Comment.** Section 1120.5 is added to promote attorney accountability in the mediation context, while also enabling an attorney to defend against a baseless allegation of mediation

misconduct. It creates an exception to the general rule that makes mediation communications and writings confidential and protects them from admissibility and disclosure in a noncriminal proceeding (Section 1119). The exception is narrow and subject to specified limitations to avoid unnecessary impingement on the policy interests served by mediation confidentiality.

Under paragraph (1) of subdivision (a), this exception pertains to an attorney's conduct in a professional capacity. More precisely, the exception applies "when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation — that is, an obligation the attorney has *by virtue of* being an attorney — in the course of providing professional services." *Lee v. Hanley*, 61 Cal. 4th 1225, 1229, 34 P.3d 334, 191 Cal. Rptr. 3d 536 (2015) (emphasis in original); *see also id.* at 1239. "Misconduct does not 'aris[e]' in" the performance of professional services ... merely because it occurs during the period of legal representation or because the representation brought the parties together and thus provided the attorney the opportunity to engage in the misconduct." *Id.* at 1238. The exception applies only with respect to alleged misconduct of an attorney acting as an advocate, not with respect to alleged misconduct of an attorney-mediator.

Paragraph (1) also makes clear that the alleged misconduct must occur in the context of a mediation or a mediation consultation. This would include misconduct that allegedly occurred at *any* stage of the mediation process (encompassing the full span of mediation activities, such as a mediation consultation, a face-to-face mediation session with the mediator and all parties present, a private caucus with or without the mediator, a mediation brief, a mediation-related phone call, or other mediation-related activity). The determinative factor is whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.

Paragraph (1) further clarifies that the exception applies evenhandedly. It permits use of mediation evidence in specified circumstances to prove *or* disprove allegations against an attorney.

Paragraph (2) of subdivision (a) specifies the types of claims in which the exception applies: (1) a State Bar disciplinary action, which focuses on protecting the public from attorney malfeasance, and (2) a legal malpractice claim, which further promotes attorney accountability and provides a means of compensating a client for damages from breach of an attorney's professional duties in the mediation context. The exception does not apply for purposes of any other kind of claim. Of particular note, the exception does not apply in resolving a claim relating to enforcement of a mediated settlement agreement (e.g., a claim for rescission of a mediated settlement agreement or a claim for enforcement of a mediated settlement agreement). That restriction promotes finality in settling disputes and protects the policy interests underlying mediation confidentiality.

Subdivision (b) is modeled on Section 6(d) of the Uniform Mediation Act.

Subdivision (c) gives a court discretion to use existing procedural mechanisms to prevent widespread dissemination of mediation evidence that is admitted or disclosed pursuant to this section. For example, a party could seek a sealing order pursuant to the existing rules governing sealing of court records (Cal. R. Ct. 8.45-8.47, 2.550-2.552). Any restriction on public access must comply with constitutional constraints and other applicable law. *See, e.g., NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 980 P.2d 330, 86 Cal. Rptr. 2d 778 (1999).

Under subdivision (d), when a party files a legal malpractice case in which mediation communications or writings might be disclosed pursuant to this section, that party must promptly provide notice to the mediation participants regarding commencement of the case. Each mediation participant is entitled to such notice, so long as the participant's identity and address is reasonably ascertainable. This affords an opportunity for a mediation participant who would not otherwise be involved in the malpractice case to take steps to prevent improper disclosure of mediation communications or writings of particular consequence to that participant. For instance, a mediation participant could move to intervene and could then seek a protective order or oppose an overbroad discovery request.

Subdivision (e) makes clear that the enactment of this section has no impact on the state of the law relating to mediator immunity.

1 See Sections 250 (“writing”), 1115(a), (c) (“mediation” and “mediation consultation”). For  
2 restrictions on mediator testimony, see Section 703.5. For availability of sanctions, see, e.g.,  
3 Section 1127; Code Civ. Proc. §§ 128.5, 128.7.

4 **Uncodified (added). Operative date**

5 SEC. \_\_\_\_\_. (a) This act shall become operative on January 1, 2019.

6 (b) This act only applies with respect to a mediation or a mediation consultation  
7 that commenced on or after January 1, 2019.

8 **Comment.** To avoid disrupting confidentiality expectations of mediation participants, this act  
9 only applies to evidence that relates to a mediation or a mediation consultation commencing on or  
10 after the operative date of the act.

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